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No. 17298

In the
United States Court of Appeals
For the Ninth Circuit

CMAX, INC., also D. B. A. CITY MESSENGER OF HOLLYWOOD and CITY MESSENGER AIR EXPRESS,
Appellant,

vs.

DREWRY PHOTOCOLOR CORPORATION,
Appellee.

Appellant's Opening Brief

PHIL JACOBSON,
H. J. BISCHOFF,
By H. J. BISCHOFF,
610 South Main Street
Suite 736
Los Angeles 14, California
Attorneys for Appellant.

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Appellant's Opening Brief

INTRODUCTORY STATEMENT

This is a claim by a common carrier for uncollected freight charges on shipments transported for defendant in 1955, 1956 and 1957. (Tr. 6). The complaint alleges that plaintiff is an "Air Freight Forwarder" as defined in 14 *Code of Federal Regulations* 296.2-a under operating authority granted to it by the Civil Aeronautics Board. (Tr. 4). That during the time the transportation service was rendered to defendant, plaintiff had on file with the said Board tariffs of its

rules and rates as required by 14 *Code of Federal Regulations* 221.4(h), 221.4(w) and 221.75. (Tr. 4-5). The complaint alleges that under the applicable tariffs on file with the Board, the lawful charges of plaintiff are $28,781.25, on which the defendant has paid $16,085.76, leaving a balance of $12,696.09 due and unpaid. (Tr. 6).

Plaintiff's claim arises under the provisions of section 403 of the *Civil Aeronautics Act of 1938,* 49 U.S.C. 483 and 1373. The District Court has jurisdiction under 28 U.S.C. 1337. (Tr. 3).

STATEMENT OF THE CASE

Under its claim, plaintiff seeks to recover additional charges for transportation services rendered by it to defendant in 1955, 1956 and 1957, known in transportation parlance as undercharges, consisting of the difference between the charges required to be assessed under its lawfully published tariffs, and the charges actually assessed at the time the services were rendered.

Plaintiff stated its claim in two counts:

The first count was on balance due for services rendered (Tr. 3-6) and the second count was for balance due on an open book account. (Tr. 7). In addition to traversing the material allegations of each count, defendant pleaded the same six affirmative defenses to each count. (Tr. 8-11). After the claims were at issue each party moved for summary judgment under rule 56 of the *Federal Rules of Civil Procedure.* (Tr.

12-13). Defendant combined with its motion for summary judgment, a motion for judgment on the pleadings, under Rule 12(c) of the *Federal Rules of Civil Procedure*. Defendant presented matters outside of the pleadings consisting of affidavit of John Harman, (Tr. 14-15) and request for admission of facts. (Tr. 16-17). Under these circumstances, defendant's motion should be treated as one for summary judgment. (Rule 12(c) *Federal Rules of Civil Procedure*).

Plaintiff in support of its motion and in reply to defendant's motion for summary judgment presented an Affidavit of Elliot S. Fullman showing the methods employed by it in keeping its book account with defendant. Attached to the affidavit and made a part thereof, are photostatic copies of ledger pages illustrating the entries made in its books. (Tr. 21-28).

On December 28, 1960, the trial court (Chief Judge Peirson M. Hall, presiding), rendered a memorandum of opinion and judgment dismissing count two of the complaint. (Tr. 29-30).

On January 23, 1961 Judgment was entered dismissing the claim of plaintiff on count two of its complaint. (Tr. 31-32).

On January 26, 1961, plaintiff filed its notice of appeal to the United States Court of Appeals for the Ninth Circuit from the judgment dismissing the Second Count of the complaint and entering judgment in

favor of Defendant on January 23, 1961 pursuant to Rule 54(b) of *Federal Rules of Civil Procedure.* (Tr. 32).

ISSUES OF LAW

1. **The Question Here is Whether the Allegations of Plaintiff's Second Count State A Cognizable Claim on A "Book Account" As That Term is Used in Section 337(2) of the California Code of Civil Procedure.**

2. **Another Question Here is Whether the Entries Made by Plaintiff in Its Ledger Were Treated by Both Parties As An Open Account of Their Transactions.**

3. **The Loose Leaf Ledger Kept by Plaintiff Meets the Formal Requirement Laid Down by California Case Law, and the Recent Enactment of Section 337a Code of Civil Procedure. (Stat. 1959)**

4. **The Elapsed Time Between the Last Entry in Its Ledger in 1957 and the Entry of Undercharges in August, 1959, is No Bar of the Statute of Limitations.**

ARGUMENT

Supplementing the allegations in plaintiff's Second Count (Tr. 7), there are contained in this record prints of copies of plaintiff's ledger. One of these, marked Exhibit A, is a sheet of the ledger showing entries from January 8, 1957 to July 23, 1957. These entries were made in the regular course of business, and show the usual entries of a ledger, namely, the date of entry, item number, charges, credits and balance. (Tr. 23). No entries were made after July 23, 1957, until August 1959, when the additional charges here involved, were entered as alleged in paragraph 2 of Second Count. (Tr. 7).

Statements were rendered to defendant as charges were entered in the account, a typical example is Exhibit B. (Tr. 24). This shows the date charges were entered, item number, amount of charge, previous balance and balance due near the top of Exhibit B. (Tr. 24). To illustrate the continuous practice of rendering statements to defendant, the affidavit of Elliot S. Fullman shows an itemized list of book balances and statements to defendant. This is marked Exhibit D and covers a period beginning with May 12, 1955 and ending with November 14, 1955. (Tr. 25-28). This evidence is offered to show that defendant was made aware that plaintiff was keeping an open book record of the account with defendant, and that the transactions were not casual but continuous.

1. The Question Here is Whether the Allegations of Plaintiff's Second Count State A Cognizable Claim on A "Book Account" As That Term is Used in Section 337(2) of the California Code of Civil Procedure.

Before its amendment in 1917 section 337(2), *supra,* read as follows:

> "An action to recover a balance due upon a mutual, open and current account *or upon an open book-account.*" (Stat. 1907, Chap. 323, par. 1, Page 599). Emphasis supplied.

Up to this time only a "mutual, open and current account" was subject to the provisions of section 344 *Code of Civil Procedure.*[1]

Probably the first Appellate Court decision in California, construing the 1907 amendment of sec. 337(2) *Code of Civil Procedure,* held that the four-year statute of limitations did not apply to an "open book account" unless payments had been made on account. (*Merchants' Collection Agency v. Levi,* 32 Cal. App. 595, 163 P. 870, (Jan. 26, 1917).) The next important decision was *Furlow P. B. Co. v. Balboa L. & W. Co.,* 1921, 186 Cal. 754, 200 P. 625. This was an action on

[1]Section 344 Code of Civil Procedure. WHERE CAUSE OF ACTION ACCRUES ON MUTUAL ACCOUNT. In an action brought to recover a balance due upon a mutual, open, and current account, where there have been reciprocal demands between the parties, the cause of action is deemed to have accrued from the time of the last item proved in the account on either side. (Enacted 1872)

an "open book account" and was held maintainable under the 1917 amendment, as well as under the 1907 amendment of section 337(2) *Code of Civil Procedure.*

The 1907 amendment of section 337(2), *supra,* bases the cause of action on a "balance due" upon an "open book account," whereas, the 1917 amendment of section 337(2) provides for,

> "an action to recover (1) upon a book account whether consisting of one or more entries."

The change in the statute was ably discussed by Mr. Justice Sturtevant of the First Appellate District in *Bailey v. Hoffman,* 1929, 99 Cal. App., 347, 278 P. 498. It was contended in that case, that under section 337(2) as amended in 1917, all items not falling within the four-year term were barred, because of the omission of the words "a balance due." The opinion of Judge Sturtevant in *Bailey v. Hoffman,* supra, points out that the contentions made call for statutory interpretation, and in referring to *Furlow v. Barlow,*[2] supra, stated that the Supreme Court of California in that case inferentially held that section 344 of the *Code of Civil Procedure* was made applicable to all accounts mentioned in section 337(2) as amended in 1917. We

[2]"The rule has long been settled in this state with reference to a mutual, open and current account mentioned in subdivision 2, section 337 of the Code of Civil Procedure, that the statute runs from the date of the last item shown in the account (*Carter v. Canty,* 181 Cal. 749, 186, P. 346.) The evident purpose of the amendment, subdivision 2, section 337 of the Code of Civil Procedure, was to put an "open book account" upon the same basis."

can do no better than to quote from the Court's opinion in *Bailey v. Hoffman,* supra, at page 351:

> STURTEVANT, J. 351: "In other words, the Court decided that the legislature sought to eliminate all distinctions in applying the statute of limitations to the two classes of accounts. When the amendment of 1917 was made we think that the legislature sought to eliminate any distinction as to accounts generally and sought to place actions to recover (1) upon a book account *whether open or not;* (Emphasis supplied) (2) upon an account stated; (3) a balance due upon a mutual, open, and current account all on the same basis. The omission of the word 'balance' is of negligible importance. It is expressly used regarding a mutual account. It is necessarily implied as to an account stated. In the sense of 'a total' it is necessarily implied as to a book account because to hold otherwise would authorize a plaintiff to sue for one item at a time as distinguished from suing on an account. As amended in 1917 the expression *'a book account' includes and refers to an open book account and also to a book account, which consists of entries on one side. As to the latter class it would be illogical to speak of 'a balance.'* (Emphasis supplied).

Unquestionably, it is the settled law in California, that an action on a "book account" is an action on a balance due, and not on the individual items making up the account. (*Moss v. Underwriters' Report, Inc.,* 1938, 12 Cal. 2d 266, 271, 83 P. 2d 503).

2. Another Question Here is Whether the Entries Made by Plaintiff in Its Ledger Were Treated by Both Parties As An Open Account of Their Transactions.

In the opening paragraphs of this argument, it was shown that continuous shipments were tendered to plaintiff by defendant, and that plaintiff's charges therefor were entered in its account books. Usually, within a period of seven days, the defendant was billed for plaintiff's charges. (Tr. 24).

An open account has been defined in 1 *Ruling Case Law* 207 as follows:

> "In legal and commercial transactions it is an unsettled debt arising from items of work and labor, goods sold and delivered, and other open transactions, not reduced to writing, and subject to future settlement and adjustment."

This definition is quoted with approval in *Mercantile Trust Co. v. Doe,* 1914, 26 Cal. App. 246, 253, 146 P. 692 and by this Court in its recent decision of *Costello v. Bank of America National Trust & Sav. Ass'n.,* (1957), 246 F. 2d 807, 812. In the *Mercantile Trust Co.* Case, supra, it is further stated at p. 254, as follows:

> "It was not necessary that plaintiff should prove an express agreement by defendant that the account should be treated as an open account. As stated in 1 *Ruling Case Law,* page 207, 'it is usually disclosed by the account books of the owner

of the demand'; *and may be shown by the circumstances attending the dealings between the parties.*" (Emphasis supplied).

The situation here is so clearly established by the account books and the conduct of the parties that a book account was created, that there seems no point in citing cases. A reference to *Warda v. Schmidt,* 1956, 146 Cal. App. 2d 234, 237, 303 P. 2d 762, should suffice.

A case very similar on facts came before the Supreme Court of Iowa as early as 1896. This was an action for over charges by a shipper against a railroad, whereas the instant case is a claim for under charges by a carrier against a shipper. (*Higby et al. v. Burlington C. R. & N. Ry. Co.,* 1896, 99 Ia. 503, 68 N.W. 829, 830).[3] Cited as authority in 1 R.C.L. 207.

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[3]*Higby et al. v. Burlington C. R. & N. Ry. Co.,* (1896) 99 Ia. 503, 68 N. W. 829, 830. Head note 2: Plaintiff had made shipments over defendant's railroad during several years, and settled the freight bills presented by defendant. In each of the bills the company had charged defendant overweight. Held, that the several items of money paid defendant as freight on the excessive weight constituted an open account within the statute of limitations.

From the opinion of the Court at page 830: "It is said that plaintiffs are barred as to all items dated prior to August 10, 1889. It is urged that these items did not constitute an open, running account; that each item was a distinct transaction. There was no settlement regarding the payments of these items of over charges. They were never adjusted between the parties. We think these numerous items should be treated as constituting an open account."

3. The Loose Leaf Ledger Kept by Plaintiff Meets the Formal Requirements Laid Down by California Case Law, and the Recent Enactment of Section 337a Code of Civil Procedure. (Stat. 1959, Chap. 1010).

"The law does not prescribe any standard of bookkeeping practice which all must follow, regardless of the nature of the business of which the record is kept. We think it makes no difference whether the account is kept in one book or several so long as they are permanent records, and constitute a system of bookkeeping as distinguished from mere private memoranda." *Egan v. Bishop* (1935) 8 Cal. App. 2d 119, 122, 47 P. 2d 500; *Robin v. Smith* (1955), 132 Cal. App. 2d 288, 290-1, 282 P. 2d 135. "A book account is defined as a 'detailed statement kept in a book, in the nature of debit and credit, arising out of contract or some fiduciary relation.' " (1 C.J. 597). "A necessary element is that the book shall show against whom and in whose favor the charges are made." (1 C.J. 598). *Wright v. Loaiza* (1918) 177 Cal. 605, 606-7, 171 P. 311; *Joslin v. Gertz* (1957) 155 C.A. 2d 62, 65, 317 P. 2d 155. "It must also be made to appear in whose favor the charges run. This may be shown by the production of the book from the possession of the plaintiff and his identification of it as the book in which he kept the account between him and the debtor." (*Joslin v. Gertz,* pp. 65-66, supra).

As appears from plaintiff's complaint, the transportation charges for which the defendant was billed

were less than the charges that accrued under plaintiff's published tariffs. (Tr. 6).

The applicable part of section 337a *Code of Civil Procedure* reads as follows:

> "and is kept in a reasonably permanent form and manner and (1) in a bound book, or (2) on a sheet or sheets fastened in a book or to backing but detachable therefrom or (3) on a card or cards of a permanent character, or is kept in any other reasonably permanent form and manner."

4. The Elapsed Time Between the Last Entry in Its Ledger in 1957 and the Entry of Undercharges in August, 1959, is No Bar of the Statute of Limitations.

We have heretofore shown under paragraph 1 of our argument that under the 1917 amendment to section 337(2) C.C.P., the four-year statute of limitation starts to run from the date of the last entry of an open book account. The entry for undercharges in August, 1959 is well within the four-year period.

We are unable to follow the reasoning of the trial court in dismissing plaintiff's Second Count. The trial court cited *Costello v. Bank of America National Trust & Sav. Ass'n.*, 1957, 246 F.2d 807, decided by this Court, on the point that to establish an open book account it is not only necessary to show the existence of book entries but also that both parties treated the records as an "open book account." We agree with this, as our

argument has shown. The trial court also cited *Groom v. Holm,* 1959, 176 Cal. App. 2d 310, but on what issue is not apparent. In a very brief memorandum of opinion the trial court stated as follows:

> "The undercharges of more than $12,000.00 were not entered in its books of account until at least August, 1959—two years and seven months after it had entered in the books the charges shown on air bills issued by it to the defendant. Such conduct does not amount to an open book account (*Code of Civil Procedure,* section 337a). See *Costello v. Bank of America* (9 Cir. 1957) 246 F. 2d 807, and *Groom v. Holm* (1959) 176 C.A. 2d 310."

It has been held in California that recovery lies on the account although more than four years has elapsed between some entries and the last entry. In *Rosati v. Heiman,* (1954), 126 Cal. App. 2d 51, 55-6, 271 P. 2d 953, the Court said:

> pp. 55-6: "The action is on the book account and is therefore on the entire account and not upon the separate items. It follows that the action may include items entered more than the statutory period prior to the entry of the last item. (*Gardner v. Rutherford,* 57 Cal. App. 2d 874, 136 P. 2d 48)."

Although the action is on the account, the items constitute the basis of the claim. Defendant charges the items are unenforceable claims because of misrepresentation, fraud, laches and estoppel. In the summary motion proceeding no showing was made on these is-

sues. All of the items of undercharges here involved constitute the difference between the plaintiff's published rates and the amount originally collected from the defendant. The law is too well settled to require extended discussion, and we will content ourselves by citing authorities on the issues raised by the affirmative defenses.

Tariffs bind both carriers and shippers with the force of law (*Lowden v. Simonds-Lonsdale Grain Co.,* 306 U.S. 516, 520, 59 S. Ct. 612, 614, 83 L. Ed. 953).

No act or omission of the carrier, except the running of the statute of limitations can estop or preclude it from enforcing payment of the full amount by a person liable therefor. (*L. & N. R. R. v. Central Iron Co.,* 265 U.S. 59; *L. & N. R. Co. v. Maxwell,* 237 U.S. 94, 98, 35 S. Ct. 494, 58 L. Ed. 853; *Pittsburgh C. C. & St. L. R. Co. v. Fink,* 250 U.S. 577, 40 S. Ct. 27, 63 L. Ed. 1151).

The law makes no distinction between innocent and intentional misquotations. (*F. Burkhart Mfg. Co. v. Fort Worth etc. Ry. Co.,* 149 Fed. 2d 909, 8th Cir. and cases cited). As stated by Mr. Justice Hughes in *L. & N. R. Co. v. Maxwell,* supra, in referring to a published rate, "deviation from it (filed rate) is not permitted upon any pretext."

The Interstate Commerce Act provides for time in which actions for undercharges must be brought by railroads (49 U.S.C.A. 16(3)(a)). Its counterpart, the

Civil Aeronautics Act of 1938 and 1958 has no similar provision, and the statute of limitations of the state in which the claim arose governs. This was also the rule before the Interstate Commerce Act contained section 16(3)(a). (*New York Central R. Co. v. Mutual Orange Distributors,* 251 Fed. 230 (1918), 9th Cir.

Collusion between the shipper and carrier to violate tariffs is no defense by the shipper in an action by a carrier to collect the full tariff charges (*National Carloading Corp. v. Atchison T. & S. F. Ry. Co.,* 1945, 150 Fed. 2d 210, 9th Cir.).

The inflexibility binding shippers to pay and carriers to collect the tariff charges under provisions of the Interstate Commerce Act apply equally under the Civil Aeronautics Act. (*United States v. Associated Air Transport, Inc.,* 1960, 275 Fed. 2d 827, 833).

The severe penalties imposed on shippers and carriers alike by the *Elkins Act,* 49 U.S.C.A. sections 41-43, in connection with interstate transportation by railroad, motor carriers and water carriers, has its counterpart for air transportation under 49 U.S.C.A. section 1472(a).

CONCLUSION

Under Rule 56(b) of the *Federal Rules of Civil Procedure,* the trial court was authorized to render judgment on all issues except the amount of money the plaintiff was entitled to recover. On the record presented here, plaintiff was entitled to a summary judgment. No appeal was taken for failure of the trial court to grant the motion of plaintiff, for the obvious reason that the order made was not appealable. Defendant combined a motion for judgment on the pleadings with its motion for summary judgment. Because defendant presented a request for admissions and an affidavit of one of its officers in support of its twin motions, the motion for judgment on the pleadings can only be treated as a motion for summary judgment under Rule 12(c) of the *Federal Rules of Civil Procedure.*

A comparison of the following two paragraphs of the trial court's memorandum (Tr. 30) are inconsistent:

> "Defendant's motion for judgment of dismissal on the pleadings as to plaintiff's second cause of action will be granted upon presentation of the proper form of judgment under the Rules."
>
> "That being so, the motions for both parties for summary judgment on plaintiff's second cause of action are moot, and on that ground are denied."

The pleadings, affidavits, request for admissions of both parties constituting the entire record are before this Court. It is hoped that under these circumstances, this Court will not only reverse the judgment rendered herein, but direct the trial court, to set matter for trial to determine only, the amount of money due plaintiff.

Respectfully submitted,

PHIL JACOBSON,
H. J. BISCHOFF,
By H. J. BISCHOFF,
Attorneys for Appellant.

No. 17298

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CMAX, Inc., also D.B.A. City Messenger of Hollywood and City Messenger Air Express,

Appellant,

vs.

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Appellee.

APPELLEE'S BRIEF.

Dunlap, Holmes, Ross & Woodson,
800 First Western Bank Building,
Pasadena, California,
Attorneys for Appellee.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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Appellant,

vs.

Drewry Photocolor Corporation,

Appellee.

APPELLEE'S BRIEF.

Statement of the Case.

The complaint, filed on December 15, 1959, is in two counts. The first count alleges that appellee is indebted to appellant for a balance of $12,696.09 plus interest, for services rendered by appellant as an air-freight forwarder during the period January 1955 to and including February 1957. The second count alleges that said amount is the balance due "upon an open book account". [Tr. 3.]

After answer was filed, appellee moved for judgment on the pleadings or, in the alternative, for summary judgment, as to the entire complaint and each count thereof. [Tr. 12.]

The motion for summary judgment was denied. [Tr. 29.] The motion for judgment on the pleadings was granted as to the second count and denied as to the first count. [Tr. 29.] Judgment was entered accordingly [Tr. 31] and this appeal followed. [Tr. 32.]

The Issue on Appeal.

The sole issue on this appeal is whether the complaint shows on its face that the alleged undercharges are not part of "an open book account".

Appellant is mistaken in suggesting that appellee's motion for judgment on the pleadings must be regarded as a motion for summary judgment. Appellee's motion was in the alternative [Tr. 13] and the District Judge expressly excluded "all matters in the file outside the pleadings" in announcing his decision on the motion for judgment on the pleadings. [Tr. 29.] It is not believed that Rule 12(c) intends to preclude the contemporaneous filing and determination of both motions. They are traditionally so filed and considered (*Sauquoit Valley Farmers Co-op. v. Wickard,* D. C. N. Y. 1942, 45 Fed. Supp. 104; *Palmer v. Palmer,* D. C. Conn. 1940, 31 Fed. Supp. 861, 863). In all events, the judgment was correct and no prejudice to appellant resulted from the court's dismissal of the second count on the one ground rather than the other. Dismissal was proper, as hereinafter shown, whether or not matters not part of the pleadings were considered.

ARGUMENT.

In summary, appellee contends:

(1) The first count alleges an express contract or contracts for airfreightage and non-payment of part of the contract price, recovery for part or all of which is barred by the statute of limitations. The second count alleges an open book account based on the same facts. The only function of the second count is to avoid the statute of limitations. This is not permitted.

(2) The second count attempts to add to the supposed "account" items that were not included therein at the time the account was current. This is not permitted.

(3) But in all events the complaint shows that the account, if ány, on which the second count is based is neither an "open" account nor a "book" account but, if an account at all, is a "simple" or "ordinary" account as these terms are defined by applicable law, the distinction being significant in light of the statutes of limitations.

1. The Complaint Pleads the Same Cause of Action on Two Counts.

The Second Count incorporates by reference all the averments of the First Count, including the averments on paragraph 8 that the freightage transactions began in January 1955 and ended in February 1957. [Tr. p. 6.] Paragraph 2 of the Second Count alleges that CMAX entered in its books the charges as stated in its air bills contemporaneously with said transactions, but did not enter the alleged undercharges until August 1959 [Tr. 7], two and a half years later.

The First Count is based on alleged failure of Drewry to pay the rates established by the published tariffs of CMAX. [Paragraphs 4 and 6, Tr. 4-5.] The applicable statute of limitations on that cause of action is either two years, on an implied contract (Sec. 339(1) Calif. C. C. P.) or three years, on an obligation imposed by statute (Sec. 338(1); Sec. 737, Calif. Pub. Utils. Code), or four years, on each written contract of freightage (Sec. 337(1).) The Second Count is an attempt to plead the same contract action as an open book account to gain the benefit of the four year statute, commencing from the date of the last entry in the supposed account (Sec. 337(2).)

2. Pleading a Cause of Action on an Account to Evade the Applicable Statute of Limitations Is Not Permitted.

In *Parker v. Shell Oil Co.,* 55 Cal. App. 2d 48, at p. 55 the court said:

> ". . . the law will not permit a person, where his claim on express contract is barred by the statute of limitations, to evade the statute by the device of pleading that claim as an open account. That is undoubtedly the law. (*Tillson v. Peters,* 41 Cal. App. 2d 671 (107 P. 2d 434); *Cleveland v. Inter-City Parcel Ser.,* 22 Cal. App. 2d 574 (72 P. 2d 179); *Lee v. DeForest,* 22 Cal. App. 2d 351 (71 P. 2d 285); *Stewart v. Claudius,* 19 Cal. App. 2d 349 (65 P. 2d 933); *People v. California S. Deposit etc. Co.,* 41 Cal. App. 727 (183 P. 289).)"

To like effect: *Parker v. Shell Oil Co.,* 29 Cal. 2d 503, 507.

The case of *Cleaveland v. Inter-City Parcel Service, Inc.*, 22 Cal. App. 2d 574, reviews the California cases holding that where plaintiff's cause of action is in fact based upon an express contract the applicable statute of limitations may not be evaded by casting the pleading in the form of an action on a book account (pp. 580-582.) It was there held that the unilateral keeping of account books in which entries were made for charges whose validity could be established only by proof of an express contract provided no basis for an action on a book account (p. 582.).

3. The Complaint Shows That the Claimed Obligation Sued Upon Is Not an Open Account.

An "account" is a record of transactions involving debits and credits *(Millet v. Bradbury,* 109 Cal. 170, 173.).

A "book account" is defined by Sec. 337a California C. C. P. as:

> "The term 'book account' means a detailed statement which constitutes the principal record of one or more transactions between a debtor and a creditor arising out of a contract or some fiduciary relation, and shows the debits and credits in connection therewith, and against whom and in favor of whom entries are made, is *entered in the regular course of business as conducted by such creditor* or fiduciary, and is kept in a reasonably permanent form and manner and is (1) in a bound book, or (2) on a sheet or sheets fastened in a book or to backing but detachable therefrom, or (3) on a card or cards of a permanent character, or is kept in any other reasonably permanent form and manner." (Emphasis added.)

In *Costello v. Bank of America National Trust and Savings Association,* 246 F. 2d 807, 812, this court, applying California law, held that an account is not "open" unless its currency, or *openness,* is intended by both parties to the account. This court said (812-813):

> ". . . a requisite of an open book account is that it be treated as such by the transacting parties. . . .
>
> * * *
>
> ". . . The record discloses no evidence that *both* the bankrupt and the State treated the account book as an 'open book account'. Thus, the conclusion that the assigned account was represented by 'an open book account' in the sense of that phrase as it has been interpreted by the California courts, cannot stand. Therefore, we hold that there was no open book account to come within the statute, and no necessity to file notice of the assignment."

In *Merchants Collection Agency v. Levi,* 32 Cal. App. 595, it was stated that the openness of the account depends upon the intent of the parties (p. 597).

CMAX entitled its complaint herein "Complaint for Freight Undercharges" [Tr. 3] and alleges that the claimed undercharges were entered in CMAX's books in August 1959, two years and six months after the last shipping transaction occurred and the charges therefor entered in the books. It clearly appears, therefore, that this suit for "Freight Undercharges" aims to recover $12,696.09 of alleged undercharges unilaterally entered by CMAX in its books two and a half years

after the termination of the shipping relations between the parties. The "openness" of the account thus depends entirely on the unilateral act of only one of the parties, which is exactly the deficiency that condemned the openness of the account in the *Costello* case, *supra*.

In *Groom v. Holm,* 176 Cal. App. 2d 310, the contract on which the account was based required periodical payments of the balance due. This prevented the account from being "open". The court said (p. 312):

> "To escape the statutory bar upon an oral agreement and to find refuge in the four year provision for a mutual open and current account, appellant must prove the account remained open. Since the parties 'struck a balance' here on a bimonthly basis, the 'open' account terminated.
>
> "The authorities clearly call for a mutual account which is open and current. The striking of a balance by the parties closes the open account, transforming it into an account stated. The early California case of *Norton v. Larco* (1866), 30 Cal. 126 (89 Am. Dec. 70), puts the matter succinctly: 'Where there are demands on each side, the striking of a balance converts the set-off into payment, (*Ashby v. James,* 11 Mees. and Welsby, 542), and from the time the balance is ascertained by the parties and is admitted to be due from the one to the other, *the account is at an end,* and the ascertained balance is immediately subjected to the operation of the statute, as an original and separate demand. (Angell on Lim., Chap. 14 §8.)' (P. 130)." (Emphasis added.)

If the record on this appeal is deemed to correctly include the affidavit of Elliott S. Fullman [Tr. 21], as contended by CMAX, Exhibit D thereof shows that the account was periodically balanced and settled, which also prevents it from being an "open" account. *Groom v. Holm, supra,* and the authorities therein cited.

4. The Complaint Shows That the Claim Sued Upon Is Not a Book Account.

The supposed "account" not only is not "open", but is not a "book" account within the legal meaning of that term.

The mere entry of memoranda in a book does not create a book account. In *Warda v. Schmidt,* 146 Cal. App. 2d 234, the court said (p. 237):

> "A book account is created by the agreement or conduct of the parties thereto. (*Mercantile Trust Co. v. Doe,* 26 Cal. App. 246 (146 P. 692); *Gardner v. Rutherford,* 57 Cal. App. 2d 874, 885-886 (136 P. 2d 48); *Parker v. Shell Oil Co.,* 29 Cal. 2d 503, 507 (175 P. 2d 838).) The mere recording in a book of transactions or the incidental keeping of accounts under an express contract does not of itself create a book account. (*Stewart v. Claudius,* 19 Cal. App. 2d 349, 352 (65 P. 2d 933); see also *Tillson v. Peters,* 41 Cal. App. 2d 671, 676-677 (107 P. 2d 434); *Lee v. DeForest,* 22 Cal. App. 2d 351, 360-361 (71 P. 2d 285).) Such memoranda cannot be utilized under the guise of a book account as a device to extend the statute of limitations beyond the time it would run on the

> contractual obligation. (See cases collected in *Parker v. Shell Oil Co.,* 55 Cal. App. 2d 48 at page 55 (130 P. 2d 158.).)".

To like effect are *Richmond v. Frederick,* 116 Cal. App. 2d 541, 545 and *Gray v. Hall,* 104 Cal. App. 418, 419.

The statute (Sec. 337a, Calif. C. C. P.) requires that the statements in a book account be "entered in the regular course of business". This means that entries not only must relate to the course of dealing between the parties but must be made at or near the time of the transactions so recorded.

In *Egan v. Bishop,* 8 Cal. App. 2d 119, the court rejected items of a book account that were not entered in the course of the business transactions between the parties but, as in the case at bar, were added after those transactions had terminated. The court said (p. 126):

> "Included in the total amount of the verdict were items amounting to $499.86 which were included in the statement rendered but were not contained in the book account. They were more than two years old and action for their recovery was barred before the statement was rendered. The statement of the account did not revive them. (Code Civ. Proc., sec. 360.) The recovery was excessive in this amount."

In *Burchell v. Rohnert,* 133 Cal. App. 2d 82, an effort to avoid the statute of limitations by casting the complaint in the form of an action on a book account was rejected by the court, it being shown that at the

time the account was current no entry was made concerning the matters in dispute (pp. 86-87).

In *Landis v. Turner,* 14 Cal. 573, it was held that long delay in transferring entries from original memos to the permanent account book makes the book inadmissible as evidence of the account (p. 576).

In *Tipps v. Landers,* 182 Cal. 771, a lapse of six months between the transaction and its book entry was held, with other irregularities, to prevent the record from qualifying as a book account. The court said it has to be

> "a correct record made at the time of the transactions and in the usual course of business."

The cases of *Warda v. Schmidt,* 146 Cal. App. 2d 234 and *Higby v. Burlington C. R. & N. Ry. Co.,* 99 Iowa 503, 68 N. W. 829, cited by CMAX, do not suggest a contrary rule.

The *Warda* case held that entries made in a book account by a construction materials supplier just before the conclusion of the construction job were not unduly delayed inasmuch as it was customary in the trade between suppliers and building contractors to defer book entries until all quantities required for the job should be definitely known. This custom was within the knowledge and intent of the parties.

The *Higby* case in Iowa held that action may be maintained on an "open account" for recovery of overcharges by a rail carrier. That case differs significantly from the case at bar in that the overcharges were necessarily included in the accounting record of freight charges collected, whereas it is the essence of

the issue on this appeal that CMAX's alleged undercharges were not entered in its books until long after the account between it and Drewry had been terminated.

The essential vice of the CMAX contention lies in the opportunity for miscarriage of justice, if not for downright fraud, that it implies. If one party to a series of old and closed business transactions, as to which records and recollections may be lost, can revive them by the expedient of unilateral entries in old ledgers the whole purpose of statutory limitations is subverted. The liberal rule allowing the statute of limitations to commence running from the date of the last entry in an account duly kept in regular course of business never has been perverted to allow one party to ancient and closed transactions to revive them merely by adding something to the record book and calling it the "last entry".

Respectfully submitted,

DUNLAP, HOLMES, ROSS & WOODSON,

By JOHN W. HOLMES,

Attorneys for Appellee.

No. 17298

In the United States Court of Appeals

For the Ninth Circuit

CMAX, INC., also d.b.a. CITY MESSENGER OF HOLLYWOOD and CITY MESSENGER AIR EXPRESS,
Appellant,

vs.

DREWRY PHOTOCOLOR CORPORATION,
Appellee.

Appellant's Reply Brief

PHIL JACOBSON,
H. J. BISCHOFF,
By H. J. BISCHOFF,
610 South Main Street
Suite 736
Los Angeles 14, California
Attorneys for Appellant.

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Appellant's Reply Brief

JURISDICTION

This Court has jurisdiction, if as appellant contends, it is claiming under two distinct causes of action. In its first cause of action appellant pleaded a common count for money due on account of services rendered. Instead of pleading the separate items making up the account, pleading the common count states a cause of action distinct from causes of action on each separate item. In *Witkin,* 2 California Procedure p. 1239 (1954), the author says:

> "The averment of an indebtedness, not by stating the actual ultimate facts in each particular case, but by using one of a series of generalized forms consisting in part of legal conclusions, is directly opposed to a basic principle of code pleading. Nevertheless, when the codes were adopted the familiarity of lawyers with the form, and its simplicity and convenience, were sufficient to overcome this objection. And today in nearly all code states and in the federal practice, the common counts are permissible and widely used. In California it is settled that they are good against special as well as general demurrers."

See (*Pike v. Zadig,* (1915) 171 Cal. 273, 276, 152 Pac. 923; *Weitzenkorn v. Lesser,* (1953) 40 C. 2d 778, 793; *Ferro v. Citizens National Trust & Sav. Bank,* 44 C. 2d 401, 409 (1955).)

The second count of the complaint alleges a separate and distinct cause of action under the 1917 amendment to *Code of Civil Procedure* Section 337, 2 (1). [T. 7]. The language of the amendment here involved is in the following words: "An action to recover upon a book account whether consisting of one or more items."

"The cause of action is upon the account, not upon the separate charges which enter into it. When, therefore, four years have run from the date of the last entry in the account, action on the entire account is barred, but the action is not barred piecemeal as to the

several items, because in an action on the book account they are all to be regarded as a part of one entire account and cause of action (*Egan v. Bishop,* 8 C.A. 2d 119, 123 (1935).)" See also, *Kaupke v. Lemoore Canal & Irr. Co.,* (1937) 20 Cal. App. 554, 561; *Bailey v. Hoffman,* (1929) 99 Cal. App. 347, 351; *Moss v. Underwriters Report, Inc.,* (1938) 12 Cal. 2d 266, 271, 83 P. 2d 503. A book account is created by the agreement or conduct of the parties thereto. In *Gardner v. Rutherford,* 57 C.A. 2d 874, 885, the Court said:

> "In the instant case, however, it is clear from the testimony and the books themselves that the so-called rent account was carried on the books of the corporation as a complete account showing the transactions as to the rent, that it was intended by the parties to be so carried on the books of the corporation, and that the finding of the trial court that the rent account was carried on the books of the corporation as an open book account is supported by the evidence."

See to the same effect, *Warda v. Schmidt,* (1956) 146 C.A. 2d 234, 237, in which the Court said:

> "However, the parties to a written or oral contract, may, by agreement or conduct, provide that monies due under such contract shall be the subject of an account between them. (*Mercantile Trust Co. v. Doe,* Supra, 26 Cal. App. 246; *Gardner v. Rutherford,* supra, 57 Cal. App. 2d 874, 886; *Parker v. Shell Oil Co.,* supra, 29 Cal. 2d 503, 507.) In that

> event a cause of action arising therefrom is on the account and not on the underlying contract. (*Parker v. Shell Oil Co.,* supra, 29 Cal. 2d 503, 507.) Such is the situation in this case."

Entirely apart from the applicable statute of limitations to the two causes of action here involved, they differ materially. The first cause of action consists of items known as air bills on which the first cause of action is based. No further action is required by either party, whereas under the second cause of action, in addition to the foundation items, the party claiming a cause of action under a book account must make a book record of the various items and in addition thereto must establish agreement by the opposite party either expressly or by conduct that the financial transactions between the two parties shall be so treated.

Appellant concedes that it inadvertently incorporated by reference the third paragraph of paragraph numbered 8 of the First Count in the Second Count. If counsel's attention had been called to this obvious inadvertence, leave would have been sought from the trial judge to have this portion of paragraph 8 deleted from the Second Count. This inadvertence and error was not given consideration by the trial Court or by opposing Counsel and should not be given consideration now.

Appellant believes that the District Judge was justified in making the determination that there was no just reason for delay in entering judgment on the Second cause of action. This action is consistent with two late decisions of the U.S. Supreme Court (*Sears Roebuck & Co.,* 1956, 351, U.S. 427, and *Cold Metal Products Co. v. United Eng. & F. Co.,* 1956, 351, U.S. 445.) See also, decisions of this Court. (*Steiner v. 20th Century-Fox Film Corp.,* 9 Cir., 232 F. 2d 190, 193; *School District No. 5 v. Lundgren,* 259 F. 2d 101, 104; *Atkins Knoll (Guam) Ltd. v. Cabrera,* (1960) 277 F. 2d 922, 924.)

The jurisdiction of the trial judge to render the decision made in this case is not established by the decisions cited by appellee in its brief on page 2 thereof. In the *Sauquoit Valley* case the motions for judgment on the pleadings and for summary judgment were heard together. The same was true in the *Palmer* case. Since these decisions were rendered, Rule 12(c) was amended in 1946 by the addition of the following sentence:

> "If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

Appellee quotes from the memorandum of the trial judge [T. 29] as follows:

> "Excluding all matters in the file outside the pleadings, it is alleged in the complaint, and not denied in the answer, that the last shipments made by plaintiff for defendant were in February, 1957."

Did the trial judge acquire jurisdiction to rule on the motion for judgment on the pleadings notwithstanding that the ONLY MOTION extensively argued was the motion for a summary judgment? (Emphasis supplied). It would seem reasonable that the only purpose of filing a motion for summary judgment at the same time that a motion for judgment on the pleadings is filed, is for convenience. This practice contemplates that the motion for judgment on the pleadings is heard forthwith or first, and if it is denied the other motion is heard after the receipt of affidavits, answers to admissions and interrogatories. In this case there was no separate submission, or any submission, of the first motion . The twin motions were filed on April 1st 1960 [T. 13], together with the affidavit of John Harman [T. 15]. Prior to the filing of the motions, Appellee had filed a Request for Admission of Facts [T. 16] in February 1960. The memorandum of opinion of the Trial Judge was not filed until December 28, 1960 [T. 30].

Finally, Appellee contends that "no prejudice to Appellant resulted from the Court's dismissal of the Second Count on one ground rather than the other." This is true, if the trial court had jurisdiction to act as it did. If the trial court's action was without jurisdiction, the parties cannot by acquiescence or consent confer jurisdiction.

In 1946, Rule 12(b)6 was also amended by the addition of the same sentence made to Rule 12(c), supra. Several recent decisions have applied the amended Rule 12(b)6: *Mantin v. Broadcast Music,* 1957, 248 2d 530 and *McPherson v. Amalgamated Sugar Company,* 1959, 271 F. 2d 809, 810. We have found no authority, authorizing the rendition of a judgment on the motion to dismiss or for a judgment on the pleadings without also rendering a judgment for summary judgment, when matters outside the pleadings were presented. If this Court decides that the trial court was without jurisdiction, appellant is entitled to costs under Rule 25 (3) of this Court.

REPLY TO APPELLEE

Appellee begins its argument by stating what it contends its position to be, as follows:

(1) "The first count alleges an express contract or contracts . . . The second count alleges an open book account based on the same facts." The facts are that for a first count appellant alleged that for its services there was due 28,781.85 dollars upon which the appellee

paid 16,085.76 dollars leaving a balance of 12,696.09 dollars due and unpaid [T. 6]; and for a second count appellee became indebted to appellant in the sum of 12,696.09 dollars upon an open book account [T. 7]. The differences between the two causes of action have been explained at the outset in this reply, and in the interest of brevity will not be repeated.

(2) "The second count attempts to add to the supposed "account" items that were not included therein at the time the account was current. This is not permitted." The facts are that the amount claimed is the same under both counts. As explained in appellant's opening brief [p. 8], that under the 1917 amendment to Section 337 C.C.P. the expression "a book account" includes and refers to an open book account and also to a book account. What appellee means by its dogmatic statement, "This is not permitted," is of doubtful meaning.

(3) If appellant correctly interprets this item it is that appellee contends that appellant did not plead a sum due upon a book account.

Appellee divides its argument into four parts. Appellant will reply thereto in *seriatim*.

1. APPELLANT HAS PLEADED TWO SEPARATE AND DISTINCT CAUSES OF ACTION.

At the outset in this reply brief, appellant has explained the two separate causes of action. In that connection it also explained its inadvertence in alleging portions of paragraph 8 by reference as a part of Count 2. Appellant may add, that such portions may be characterized as surplusage.

Appellant discloses as an introduction to its Second Count and pursuant to an audit, the claimed undercharges were entered on its books of account in the month of August, 1959, which appellee alleges took place two and a half years after the last shipment was tendered to appellant by appellee [p. 6]. As explained under the heading "*Jurisdiction,*" a book account is created by the agreement or conduct of the parties thereto, and such relationship not having been rescinded at the time the last entry was made in August, 1959, the entry on the books is valid. If the last previous entry on the books took place in February 1957, the four year statute of limitations commenced to run from that date. (*Schneider v. Oakman Consol M Co.,* 38 Cal. App. 338, 341, 176 P. 177; *Gardner v. Rutherford,* 57 C.A. 2d 874, 883, 136 P. 2d 48; *Rosetti v. Heiman,* 126 C.A. 2d 51, 56, 271 P. 2d 953.) Since the August 1959 entry, the four year statute runs from that date.

Under the 1917 amendment of Section 337 C.C.P. subdivision 2, the action is on the entire account and not on the individual or separate items.

2. AFTER ITEMS ARE BARRED BY THE STATUTE OF LIMITATIONS THEY CANNOT BECOME ITEMS OF AN OPEN ACCOUNT.

This heading does not correspond with point 2 of Appellee's argument [p. 4] but is consistent with the quotation from *Parker v. Shell Oil Co.,* 55 Cal. App. 2d 48, 55:

> "The law will not permit a person, where his claim on express contract is barred by the statute of limitations, to evade the statute by the device of *pleading that claim* as an open account."

The authorities cited in *Parker v. Shell Oil Co.,* supra, were never treated by the parties as items of an open account, and under such circumstances, one party cannot evade the bar of the statute of limitations by pleading an open account. (*Parker v. Shell Oil Co.,* 29 C. 2d 503, 507.)

The case of *Cleaveland v. Inter City Parcel Service, Inc.,* 22 Cal. App. 2d 574 had to do with a claim for additional rent. Suit on book account was not sustained as the books of account did not show the alleged additional rent. Appellant fails to see how this decision tends to prove any issue here.

3. APPELLEE CONTENDS THAT APPELLANT HAS NOT PLEADED AN OPEN ACCOUNT.

Presumably, appellee addresses this contention to the form of the pleading. The Second Count is pleaded in the following language:

> "By reason of the aforesaid services rendered during the aforesaid period, the defendant became indebted to the plaintiff in thesum of 12,696.09 dollars upon an *open book account,* said sum of 12,696.09 dollars being the balance due and owing to plaintiff."

Appellee cites no authorities, which are in point. The cited cases deal with proof and not with pleading.

4. APPELLEE CONTENDS THAT APPELLANT HAS NOT PLEADED A BOOK ACCOUNT.

Appellant has no quarrel with the decisions cited. None of them are in point, however the case of *Egan v. Bishop,* 8 Cal. App. 2d 119, is generally considered as one of the leading cases on "book account claims." On page 123, under paragraph [6], the court states the fundamental principle governing book accounts. Appellant fails to see, how the quotation from that case to the effect that the creditor could not revive an item of his claim by pleading it as part of a book account, aids the appellee here, either on the issue of pleading or proof. The book account item here in question was en-

tered on the appellant's books before it was barred by the statutes.

In the *Burchell v. Rohnert* cited by appellee 133 C.A. 2d 82, 86-87, the claimant sought the benefits of the book account statute without a showing that the adjusted claim had been entered on the books of the parties.

Failure of proof to establish a book account, as in *Tipps v. Landers* cited by appellee does not meet any issue here.

Appellee distinguishes the *Warda v. Schmidt* case on the question of delayed entries because of the practice in the industry known to both parties. In this connection it might be mentioned that both appellant and appellee were conclusively presumed to know that the transportation charges based on published tariffs could not be varied under any pretext. The *Warda* case also cites *Schneider v. Oakman Consol M. Co.,* 38 C.A. 338, 341, 176 P. 177 a case of delayed entry on the books of the parties.

In referring to the case of *Higby v. Burlington C. R. & N. Ry. Co.,* 99 Iowa 503, 68 N.W. 829 cited by appellant in its opening brief [p. 10], appellee argues that this case is distinguishable because it involved overcharges whereas the case at bar involved undercharges. This seems a distinction without a difference, as both involved adjustment in the charges that had been made previously.

Finally, appellee on page 11 treats the claim here as a revivor of a barred claim which of course, it is not. Although, appellant in its opening brief cited cases in point on delayed entries, appellee ignored them in its reply brief.

Respectfully submitted,

PHIL JACOBSON,
H. J. BISCHOFF,

By H. J. BISCHOFF
Attorneys for Appellant.

No. 17298

United States Court of Appeals

for the Ninth Circuit

CMAX, INC., also D. B. A. CITY MESSENGER OF HOLLYWOOD and CITY MESSENGER AIR EXPRESS,

Appellant,

vs.

DREWRY PHOTOCOLOR CORPORATION,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division

Parker & Son, Inc., Law Printers, Los Angeles 5-1-61—6-22-61

No. 17298

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

PHIL JACOBSON,
H. J. BISCHOFF,

610 South Main Street,
Los Angeles 14, California.

For Appellee:

DUNLAP, HOLMES, ROSS & WOODSON
PHILLIP S. LYDDON,

800 First Western Bank Building,
Pasadena, California.

United States District Court for Southern District of California Central Division

Civil Action No. 1299-59 PH

CMAX, Inc., also d.b.a. City Messenger of Hollywood and City Messenger Air Express.

Plaintiff,

vs.

DREWRY PHOTOCOLOR CORPORATION, a corporation,

Defendant

COMPLAINT FOR FREIGHT UNDERCHARGES

Comes now the Plaintiff for a first count herein alleges and respectfully shows to the Court:

First Count

1. This action arises under the Federal Aviation Act Section 403, 49 U. S. Code Section 1373, as hereinafter more fully appears. The District Court has jurisdiction under provisions of Title 28 U. S. Code Section 1337.

2. The Plaintiff is a corporation duly organized and existing under the laws of the State of California, having its principal place of business in the County of Los Angeles, State of California. Its Articles of Incorporation were filed with the Secretary of State of California on February 19, 1951 as City Messenger of Hollywood. On April 30, 1957 it filed with the Secretary of State of California an amendment to its Articles of Incorporation changing its name to CMAX,

Inc. It transacted its business hereinafter referred to not only in its own name but also in the names of City Messenger of Hollywood and City Messenger Air Express. On October 7, 1958, it filed with the County Clerk of Los Angeles County its certificate of fictitious names, and on November 5, 1958 it filed with the County Clerk of Los Angeles County proof of publication of said certificate all as provided by Sections 2466 and 2468 of the Civil Code of California.

3. The plaintiff is an "Air Freight Forwarder" as defined in Title 14 Code of Federal Regulations Section 296.2(a) and received from the Civil Aeronautics Board a "Letter of Registration" No. 163 effective May 22, 1954, and "Operating Authorization" No. 47 effective February 25, 1957. That said authorizations have been in effect at all times herein mentioned.

4. The plaintiff is an indirect air carrier engaged in the transportation of property as an Air Freight Forwarder in interstate commerce under its authorizations hereinbefore mentioned. Heretofore and prior to the Acts, matters and transactions, hereinafter stated, in compliance with Title 49 U. S. Code Section 1373 and Code of Federal Regulations Section 221.3(a) plaintiff filed with the Civil Aeronautics Board in the District of Columbia at Washington, its printed tariffs, showing all rates and charges for air transportation between points served by it, and showing all classifications, rules, regulations, practices, and services in connection with such air transportation, and posted and published the same as prescribed by law. That said tariffs in effect during the times herein stated consisted of Rules Tariff C.A.B. No. 1, Specific Com-

modity Tariff C.A.B. No. 4, and General Commodity Tariff C.A.B. No. 5. Said General Commodity Tariff published rates which applied on all articles or commodities except items excepted under the terms of said tariff in accordance with Title 14 Section 221.4(h) Code of Federal Regulations. Said Specific Commodity Tariff published rates on specific commodities which are specifically named or described in said tariff in accordance with Title 14 Section 221.4(w) and Section 221.75 Code of Federal Regulations. Said Rules Tariff published rules and regulations governing rates published in said General Commodity Tariff and Specific Commodity Tariff.

5. During the periods hereinafter stated in paragraph 8 various shipments of commodities, referred to in said paragraph were tendered and delivered by defendant herein, to this plaintiff for transportation in interstate commerce to various destinations. Upon receipt of such shipments, plaintiff delivered to defendant instruments in writing, described as airbills showing the lading, weight, and name and address of consignee at destination. That said shipments so received by plaintiff were forwarded to destination points for the most part over lines of Direct Air Carriers as defined in Title 14 Code of Federal Regulations Section 296.1(b).

6. All of said shipments were received subject to the rules, terms, conditions and tariffs of plaintiff, herein referred to in paragraph 4.

7. That the lawful charges for the transportaton of the shipments referred to in paragraph 8 hereof are

as prescribed in Title 49 U. S. Code Sections 483 and 1373.

8. Defendant Drewry Photocolor Corporation is a corporation organized and existing under the laws of the State of California, and was at all times herein mentioned doing business in the County of Los Angeles, State of California.

That beginning with the month of January 1955 and during each succeeding month, except the month of February 1955, to and including the month of February 1957, defendant tendered and delivered various commodities to plaintiff for transportation and forwarding to various destinations in the United States as alleged in paragraph 5 herein.

That the charges of plaintiff based upon the applicable tariffs of plaintiff on file with the Civil Aeronautics Board are 28,781.85 dollars. That defendant has paid on account of services of plaintiff herein the sum of 16,085.76 dollars leaving a balance of 12,696.09 dollars due and unpaid. That interest at the rate of 7% per annum from the date the services aforesaid were performed, to and including the date of filing this complaint is 3,307.09 dollars. That no part of the balance of principal or interest aforesaid has been paid.

That prior to the commencement of this action, an itemized statement of the claim of plaintiff was delivered to the defendant.

For a second and separate count plaintiff alleges and respectfully shows to the Court:

Second Count

1. Realleges and reaffirms paragraphs numbered 1 to 8 inclusive with the same force and effect as if herein repeated and set forth.

2. That at all times herein mentioned plaintiff entered in its books of accounts its charges as shown on air bills issued by it. That the undercharges herein involved were entered in its books of account pursuant to an audit completed in the month of August 1959.

3. By reason of the aforesaid services rendered to defendant during the aforesaid period, the defendant became indebted to the plaintiff in the sum of 12,696.09 dollars upon an open book account, said sum of 12,696.09 dollars being the balance due and owing to plaintiff. That an itemized statement of said book account showing said balance due to plaintiff has been rendered to said defendant.

Wherefore, plaintiff prays judgment against the defendant in the sum of 12,696.09 dollars, together with interest thereon amounting to 16,003.18 dollars, cost of suit, and for such other and further relief as to the Court may seem proper.

PHIL JACOBSON
H. J. BISCHOFF

/s/ By H. J. BISCHOFF
Attorneys for Plaintiff.

[Endorsed]: Filed Dec. 15, 1959.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant and for its answer to plaintiff's complaint in the above entitled action, admits, denies and alleges as follows:

Answer to First Count

1. Denies the allegation of paragraph 1 that this action arises under the Federal Aviation Act, Section 403, 49 U. S. C. Section 1373, and alleges that, if any claim for relief exists, it arises under the "Civil Aeronautics Act of 1938", Act of June 23, 1938, c.601, 52 Stat. 977, 992 Title IV §403(b), 49 U. S. C. §483(b). Defendant further denies every allegation of said complaint wherein 49 U. S. C. §1373 is referred to insofar as any right, duty, act or occurrence is alleged to be predicated thereon.

2. Denies the allegation of paragraph 5 that upon receipt of shipments, "airbills", or any other instruments in writing, were delivered to defendant.

3. Denies each and every allegation of paragraph 7 of said complaint.

4. Denies each and every allegation of paragraph 8 of said complaint set forth in the third sub-paragraph thereof at lines 20 to 30, inclusive, of page 3 of said complaint, except the allegation that defendant has paid to plaintiff the sum of $16,085.76.

Answer to Second Count

1. Defendant repeats and realleges the denials and allegation of paragraphs 1 to 4 inclusive of the answer to the first count above set forth.

2. Defendant does not have sufficient information or belief to enable it to answer the allegations of paragraph 2 of plaintiff's second count and, placing its denial upon that ground, denies generally and specifically each and every allegation of said paragraph.

3. Denies generally and specifically each and every allegation of paragraph 3 of said second count.

For affirmative defenses to plaintiff's complaint and to each count thereof, defendant alleges as follows:

First Affirmative Defense

1. Plaintiff's complaint and each count thereof fails to state a claim upon which relief may be granted.

Second Affirmative Defense

2. In or about December, 1954, and January, 1955, agents and employees of plaintiff solicited defendant to utilize the services of plaintiff as a "consolidated carrier" or freight forwarder of freight by air. At said times plaintiff advised defendant that plaintiff's charges for the carriage of defendant's goods were substantially less than those of similar carriers.

3. At and prior to said times, defendant utilized the services of other carriers at a cost in excess of the charges quoted by plaintiff. At said time, defendant could have obtained the services of other carriers at a lesser cost to it than the total charges now claimed by plaintiff. Defendant accepted plaintiff's proposals and utilized the services of plaintiff herein for a period of approximately two years, commencing in January, 1955, in reliance on said quoted rate, and adjusted the prices of its services in reliance thereon, and has sub-

stantially changed its position in reliance on said representation.

4. Should plaintiff recover the additional charges herein claimed, defendant will suffer great and unjust financial loss, which it cannot recoup from its past customers, and plaintiff is estopped to recover such additional charges.

5. Plaintiff is an indirect air carrier within the meaning of the act of June 23, 1938, c.601, Title I, §1, 52 Stat. 977, 49 U. S. C. §401 (2).

Third Affirmative Defense

1. Defendant repeats and realleges paragraphs 1 to 5 of its second affirmative defense.

2. Defendant has not utilized plaintiff's services since February, 1957, and all amounts claimed by plaintiff were purportedly incurred prior to said time, and by reason of the extended delay by plaintiff in asserting its purported claims, and the damage to defendant above alleged which resulted from said delay, plaintiff's purported claim against defendant is barred by plaintiff's laches.

Fourth Affirmative Defense

1. Defendant repeats and realleges paragraphs 1 to 5 of its second affirmative defense.

2. Plaintiff as the publisher of the applicable tariffs determining the proper and lawful charges for the carriage of defendant's goods knew, or in the exercise of reasonable care should have known, the proper and lawful charges for the carriage of defendant's goods, and misrepresented the amount of such charges to de-

fendant with the intent that defendant should rely on said misrepresentations, and is precluded by its fraud from recovering the purported additional charges.

Fifth Affirmative Defense

1. Any contracts which existed between plaintiff and defendant were made in the State of California, and each of the shipments made by plaintiff for defendant was made pursuant to a separate agreement between the parties.

2. Each of the purported claims for relief set forth in plaintiff's complaint is barred by the provisions of subdivision 1 of Section 339 of the Code of Civil Procedure of the State of California in that no part of the claimed obligations of defendant were founded upon an instrument in writing and all transactions between plaintiff and defendant, upon which said claims for relief are based, occurred more than two years prior to the commencement of this action.

Sixth Affirmative Defense

1. Any contracts which existed between plaintiff and defendant was made in the State of California, and each of the shipments made by plaintiff for defendant was made pursuant to a separate agreement between the parties.

2. The purported claims set forth in plaintiff's complaint insofar as they relate to a contract or contracts antedating December 15, 1955, are barred by the provisions of Subdivisions 1 or 2, or both, of Section 337 of the Code of Civil Procedure of the State of California, in that such transactions occurred more than four years prior to the commencement of this action.

Wherefore, defendant prays judgment that plaintiff take nothing by its complaint, for defendant's costs of suit, and for such other and further relief as the Court may deem just.

DUNLAP, HOLMES, ROSS & WOODSON
/s/ By PHILLIP S. LYDDON

Demand For Jury

Defendant respectfully presents its demand for a trial by jury.

DUNLAP, HOLMES, ROSS & WOODSON
/s/ By PHILLIP S. LYDDON

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Jan. 7, 1960.

[Title of District Court and Cause.]

MOTION FOR JUDGMENT ON THE PLEADINGS AND SUMMARY JUDGMENT, STATEMENT—POINTS AND AUTHORITIES, AFFIDAVIT OF HARMON, ADMITTED FACTS, AND PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND JUDGMENT

To Plaintiff CMAX, Inc. and Its Attorneys Phil Jacobson and H. J. Bischoff:

You, and Each of You, Please Take Notice that defendant, by its attorneys Dunlap, Holmes Ross & Woodson, will move the above-named Court at Court Room 1, United States Post Office and Court House

Building, 312 North Spring Street, Los Angeles, California, on the 11th day of April, 1960, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for Judgment on the Pleadings on defendant's Fifth Affirmative Defense, or in the alternative for Summary Judgment, in favor of defendant herein as to the entire complaint and claim of plaintiff for relief, and as to each count thereof. Said motions shall be made pursuant to Rules 12 (c) and 56 (b) of the Federal Rules of Civil Procedure, upon the ground that there is no genuine issue as to any material fact in that plaintiff's entire claim for relief is barred by Subdivision 1 of California Code of Civil Procedure §339, that there is not and as a matter of law cannot be any open account between plaintiff and defendant, and that defendant is entitled to judgment as a matter of law. Said motion will be based upon this notice, the Statement-Memorandum of Points and Authorities, affidavit, and Request for Admission of Facts attached hereto, and all of the papers and files in the above entitled action.

Dated: This 1st day of April, 1960.

DUNLAP, HOLMES, ROSS & WOODSON,

/s/ By PHILLIP S. LYDDON,

Attorneys for defendant Drewry Photocolor Corporation.

[Title of District Court and Cause.]

AFFIDAVIT OF JOHN HARMAN

State of California, County of Los Angeles—ss.

John Harman, being first duly sworn, deposes and states as follows:

He is an adult and is in all ways competent to testify in the above action.

He is an officer, to wit, Vice President, of Drewry Photocolor Corporation, and has been such at all times since January 1946. He is responsible for the shipment of said defendant's goods, i.e., photographic film, film and photographs both to and from said corporation's Glendale, California plant, and has been either in charge of such shipment or personally concerned therewith since January 1946.

On or about December, 1955, representatives of CMAX solicited Drewry Photocolor Corporation for the shipment of Drewry's goods via said CMAX, a common carrier. Because of representations as to price and service made by CMAX, Drewry shipped certain of its products via CMAX. CMAX represented and agreed to deliver incoming goods in the morning of each business day and pick up outgoing goods in the evening of each such day. Pursuant to said agreement CMAX furnished Drewry Photocolor Corporation a "pad" of documents denominated "Airbills".

For each outgoing shipment, one set of such documents (consisting of several duplicates) was removed from the pad and the name and address of Drewry Photocolor Corporation was entered as consignor, and the name and address of the consignee and a description of the goods shipped were entered. All of said

entries were made by Drewery Photocolor Corporation. At the time each shipment was picked up, one copy of said document was retained by Drewry Photocolor Corporation and signed by an employee of CMAX. The remaining copies were given to the CMAX employee picking up the shipment.

The weight, rate classification and charge for each such shipment was thereafter determined by CMAX and entered upon the original of said document, except that in some cases, only the purported charge was so entered.

Said originals, as so completed, were returned by CMAX to Drewry Photocolor Corporation approximately weekly, accompanied by a bill for all shipments during said period. Drewry Photocolor Corporation then currently paid each such bill so rendered.

As of March 15, 1957, all of said charges as set forth in said bills had been paid, with the exception of $110.00, which was disputed by Drewry on the ground of faulty performance or non-performance by CMAX. Said $110.00 was and is the total of purported charges for special services which Drewry Photocolor Corporation contended were in some cases not ordered and in others not performed.

Further affiant sayeth not.

Dated this 1st day of April, 1960.

/s/ JOHN HARMAN.

Subscribed and sworn to before me this 1st day of April, 1960.

[Seal]

/s/ ORA T. YOST

Notary Public in and for said County and State.

My Commission expires April 1, 1960.

[Title of District Court and Cause.]

REQUEST FOR ADMISSION OF FACTS

Defendant Drewry Photocolor Corporation, pursuant to Federal Rules of Civil Procedure, Rule 36, requests plaintiff CMAX within ten days after service of this request to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissability which may be interposed at any appropriate time and place:

That each of the following statement is true.

1. That within seven business days after each of the shipments referred to in paragraphs five and eight of the complaint in the above-entitled action, plaintiff CMAX entered upon the original of the written instruments, alleged in paragraph five of said complaint, figures purporting to be the correct charges for such shipment according to the agreement of plaintiff and defendant herein, and within said seven days transmitted said original instrument to defendant Drewry Photocolor Corporation together with a statement or bill for an amount of money equal to the total of such purported charges within each seven days during the period from January 1955 to and including February 1957 with the exception of the month of February 1955. Upon receipt of said statement or bill, defendant Drewry Photocolor Corporation paid the purported charges

shown thereon within the seven days next succeeding the receipt of said bill.

2. That prior to December 1, 1957, all of the purported charges as set forth in statement "1" above had been paid by defendant Drewry Photocolor Corporation to plaintiff CMAX.

3. That the above-entitled action is based upon an alleged claim by plaintiff against defendant for an amount of money equal to the difference between the amount of money paid by defendant to plaintiff as set forth in statement "1" above and an amount of money alleged in plaintiff's complaint herein, in paragraph sixth thereof, to be the total of the lawful charges for the shipments therein alleged according to the allegedly applicable tariffs published by plaintiff pursuant to the Civil Aeronautics Act of 1938, together with interest on said money.

Dated this 19th day of February, 1960.

DUNLAP, HOLMES, ROSS & WOODSON,
/s/ By: PHILLIP S. LYDDON.

[Title of District Court and Cause.]

ANSWER TO REQUEST OF DEFENDANT FOR ADMISSION OF FACTS DATED FEBRUARY 19th, 1960

State of California, County of Los Angeles—ss.

Ben Fullman, being first duly sworn, deposes and says: That he is familiar with the billing and collection of accounts of plaintiff herein including the account of plaintiff herein.

Plaintiff admits as true statement No. 1 except that the word "usually" should be inserted between the words "Corporation" and "paid" on line 8 page 2.

Plaintiff admits as true statement No. 2 except that the words "except a balance of $110.00 remains unpaid" should be added at the end thereof.

Plaintiff admits as true statement No. 3 except that the word "sixth" in line 21 page 2 should be "eighth".

BEN FULLMAN

Subscribed and sworn to before me this 2nd day of March, 1960.

ELSIE L. BRADY

Notary Public in and for said County and State.

[Title of District Court and Cause.]

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND JUDGMENT

The above-entitled cause came on regularly for hearing of defendant's motion for summary judgment on the day of , 1960, before the above-named Court, Honorable Pierson M. Hall, Judge, presiding, plaintiff appearing by its attorneys, Phil Jacobson and H. J. Bischoff by H. J. Bischoff, Esq., and defendant appearing by its attorneys, Dunlap, Holmes, Ross and Woodson by Phillip S. Lyddon, Esq., and the motion papers and reply thereto having been considered by the Court, and the Court having heard the argument of counsel for the respective parties, and the matter having been regularly submitted to the Court for decision and judgment, and the Court being now fully advised in the premises makes its findings of fact and draws its conclusions of law, as follows, to wit:

Findings of Fact

1. Plaintiff and defendant are corporations organized and existing under and by virtue of the laws of the State of California. Plaintiff is an indirect air carrier within the meaning of the Civil Aeronautics Act of 1938, Act of June 23, 1938, C.601, 52 Stat. 977.

2. That during the period from and including January 1955 to and including February 1957, plaintiff transported certain goods and materials for and at the request of defendant, pursuant to agreements by the parties as to each such shipment providing for the payment of charges for said services to plaintiff.

3. That defendant paid to plaintiff all of the charges pursuant to the above-mentioned agreements for said transportation, at a time more than two years prior to the filing of this action.

4. That the agreements between plaintiff and defendant for the transportation of goods were made in the State of California, and each shipment was made pursuant to a separate such agreement.

5. That plaintiff's claim for relief is not predicated directly upon any instrument or instruments in writing.

Conclusions of Law

1. That the above-mentioned claim for relief is subject to the law of the State of California pertaining to limitation of actions, and is barred by the provisions of California Code of Civil Procedure, Section 339, Subdivision (1).

2. That Defendant is entitled to judgment; that plaintiff takes nothing by his action, and for defendant's costs.

Judgment

In accordance with the foregoing findings of fact and conclusions of law, it is

Ordered, Adjudged and Decreed that defendant have judgment against plaintiff; that plaintiff take nothing by its action.

Dated: This day of , 1960.

.....

Pierson M. Hall, Judge United States District Court.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed April 1, 1960.

[Title of District Court and Cause.]

AFFIDAVIT OF ELLIOT S. FULLMAN

Statement of California, County of Los Angeles—ss.

Elliot S. Fullman being first duly sworn deposes and says: That he is Secretary of CMAX, Inc., and has the custody of the accounting records of CMAX, Inc. That the accounts receivable ledger consists of card board paper kept in ledger container on which CMAX, Inc., posts the debits and credits of its customers. A photostat sample copy of such ledger card is attached to this affidavit and made a part hereof marked Exhibit "A". That CMAX, Inc., in its regular course of business, posted balances after each entry of additional charges and each entry of credits. That balance due statements were sent to Drewry Photocolor, 559 W. Colorado Blvd., Glendale, California from time to time. Upon receipt of payment of such statements, the amount received was entered on the ledger as a credit to the account of said Drewry Photocolor. That such statement consisted of a form of statement in words and figures shown in Exhibit "B" attached hereto and made a part hereof. That CMAX, Inc., retained a carbon copy of the entries made on said Exhibit "B" for its records all as shown on Exhibit "C" attached hereto and made a part hereof.

That a tabulation of posted balances from the accounts receivable ledger and posted receipts are as shown in Exhibit "D" attached hereto and made a part hereof.

That the tabulation consists of the following transactions: Book balances, statements rendered for balance due, and credits including dates of each transaction and amounts involved. The last entry was on the 14th day of November 1955.

/s/ ELLIOT S. FULLMAN

Subscribed and sworn to before me this 8th day of April, 1960

[Seal] /s/ ELSIE L. BRADY

Notary Public in and for the County of Los Angeles, State of California. My Commission expires January 17, 1964.

Exhibits A, B, C and D follow on pages 23-28.

[Endorsed]: Filed April 11, 1960.

EXHIBIT A

CMAX

CMAX

ACCOUNTS RECEIVABLE
LEDGER

A

NAME Drewry Photocolor
ADDRESS 559 W. Colorado Blvd.
Glendale, Calif.

CR. RATING
CR. LIMIT
SHEET NO.

WEST COAST STA. & PTG. CO. FORM S-501-28

DATE		INVOICE NO.	CHARGES	CREDITS	BALANCE
1957			BALANCE FORWARD ☞		$113.79
JAN 8	BL	551.81	6.65 ✓		120.44*
JAN 14		551.82	7.33 ✓		127.77*
JAN 16	BL	551.83	6.60 ✓		134.37*
JAN 21			RA 443	98.73-	35.64*
JAN 18	BL	551.84	8.32 ✓		43.96*
JAN 22	BL	551.85	6.14 ✓		50.10*
JAN 28	BL	551.86	6.20 ✓		56.30*
JAN 30	BL	551.87	6.66 ✓		62.96*
FEB 1	BL	551.88	8.33 ✓		71.29*
FEB 13			RA 487	71.29-	.00*
APR 22	BL	551.90	6.27		6.27*
APR 25	BL	551.91	24.74		31.01*
APR 26	BL	551.92	24.04		55.05*
APR 29	BL	551.93	24.67		79.72*
APR 30	BL	551.94	23.86		103.58*
MAY 1	BL	551.95	21.44		125.02*
MAY 2	BL	551.97	23.17		148.19*
MAY 3	BL	551.96	20.87		
MAY 3	BL	551.98	21.39		190.45*
MAY 6	BL	551.99	25.99		216.44*
MAY 7	BL	552.00	21.27		237.71*
MAY 7	BL	552.01	25.99		263.70*
MAY 9	BL	552.02	15.79	6-6-57	
MAY 9	BL	552.03	19.45		298.94*
MAY 21				c/c 153.70-	145.24*
JUN 6			RA 659	35.24- ✓	110.00*
JUL 17	BL	552.10	12.18 ✓	7-23-57	122.18*
JUL 23		RA 725		12.18- ✓	110.00*

DUN & BRADSTREET

EXHIBIT B

City MESSENGER AIR EXPRESS

NATIONWIDE AIR FREIGHT SERVICE

AIR FREIGHT STATEMENT

Remit to: CITY MESSENGER AIR EXPRESS
1414 COLE PLACE, LOS ANGELES 28, CALIF.
Phone: HOllywood 4-1180

ACCOUNT NO.

CMAX

DREWRY PHOTOCOLOR CORP.
550 WEST COLORADO
GLENDALE, CALIFORNIA

SEPT. 26, 1955

EXHIBIT B

These charges are due within seven days.
Return duplicate statement with remittance to insure proper credit.

AMOUNT

CLOSING DATE	PREVIOUS BALANCE	AIRBILL NUMBER	CHARGES	TOTAL BALANCE DUE
	$339.45			
9/17		LAX 09671	$11.85	$520.67
9/21		LAX 01946	13.87	
9/19		LAX 01950	11.47	
9/20		LAX 09673	11.77	
9/19		LAX 01951	9.08	
		LAX 01947	15.89	
9/20		LAX 01923	5.80	
9/20		LAX 01949	19.34	
		LAX 01952	13.41	
9/20		LAX 01955	10.97	
9/21		LAX 01954	8.80	
9/21		LAX 09674	11.12	
		LAX 01953	8.70	
		LAX 09675	10.80	
		LAX 01948	18.41	

EXHIBIT C

DREWRY PHOTOCOLOR CORP.
[illegible]
[illegible]

SEPT. [illegible], 1955

339.45

9/17	LAX 09671	11.85	520.67
9/21	LAX 01946	13.87	
9/19	LAX 01950	11.47	
9/20	LAX 09673	11.77	
9/19	LAX 01951	9.08	
	LAX 01947	15.89	
9/20	LAX 01923	5.80	
9/20	LAX 01949	19.34	
	LAX 01952	13.41	
9/20	LAX 01955	10.97	
9/21	LAX 01954	8.80	
9/21	LAX 09674	11.12	
	LAX 01953	8.70	
	LAX 09675	10.80	
	LAX 01948	18.41	

EXHIBIT D

Date	Transaction	Amount
5-12-55	Book Balance	$ 200.67
5-19-55	Book Balance	251.65
5-19-55	Statement rendered for balance due	251.65
5-19-55	Credit - F/B 00408 charged twice	8.63
5-19-55	Book Balance	243.02
5-20-55	Paid by check	251.65
5-20-55	Book Balance - credit	8.63
5-23-55	Book Banance	125.53
5-23-55	Statement rendered for balance due	125.53
5-23-55	Book Balance	254.68
5-23-55	Statement rendered for balance due	254.68
5-26-55	Paid by chedk	125.53
5-26-55	Book Balance	129.15
5-28-55	Paid by check	129.15
5-28-55	Book Balance	-0-
5-31-55	Book Balance	195.77
5-31-55	Statement rendered for balance due	195.77
5-31-55	Book Balance	236.69
5-31-55	Statement rendered for balance due	236.69
6-6-55	Book Balance	455.81
6-6-55	Statement rendered for balance due	455.81
6-9-55	Paid by check	236.69
6-9-55	Book Balance	219.12
6-10-55	Paid by check	219.12
6-10-55	Book Balance	-0-
6-13-55	Book Balance	245.19
6-13-55	Book Balance	342.29
6-13-55	Statement rendered for balance due	342.29
6-18-55	Book Balance	565.24
6-18-55	Statement rendered for balance due	565.24
6-20-55	Book Balance	620.01
6-20-55	Statement rendered for balance due	620.01

Date	Transaction	Amount
6-22-55	Paid by check	$ 342.29
6-22-55	Book Balance	277.72
6-28-55	Paid by check	277.72
6-28-55	Book Balance	-0-
6-27-55	Book Balance	251.15
6-27-55	Book Balance	327.05
6-27-55	Statement rendered for balance due	327.05
7-5-55	Book Balance	545.73
7-5-55	Statement rendered for balance due	545.73
7-5-55	Book Balance	626.97
7-5-55	Statement rendered for balance due	626.97
7-7-55	Paid by check	327.05
7-7-55	Book Balance	299.92
7-9-55	Paid by check	299.92
7-9-55	Book Balance	-0-
7-11-55	Book Balance	182.78
7-11-55	Book Balance	231.52
7-11-55	Statement	231.52
7-14-55	Paid by check	231.52
7-14-55	Book Balance	-0-
7-18-55	Book Balance	270.65
7-18-55	Statement rendered for balance due	270.65
7-18-55	Book Balance (Book shows correction)	~~342.86~~ 350.38
7-18-55	Statement rendered for balance due	342.86
7-25-55	Book Balance	598.46
7-25-55	Statement rendered for balance due	598.46
7-25-55	Book Balance	660.60
7-25-55	Statement rendered for balance due	660.60
7-23-55	Paid by check	350.38
7-23-55	Book Balance	310.22
7-28-55	Paid by check	310.22
7-28-55	Book Balance	-0-
7-31-55	Book Balance	319.25

Date	Transaction	Amount
7-31-55	Statement rendered for balance due	$ 319.25
8-9-55	Paid by check	319.25
8-9-55	Book Balance	-0-
8-8-55	Book Balance	257.41
8-8-55	Statement rendered for balance due	257.41
8-8-55	Book Balance	339.33
8-9-55	Statement rendered for balance due	81.92
8-15-55	Book Balance	629.76
8-20-55	Book Balance	955.73
8-22-55	Statement rendered for balance due	326.03
8-16-55	Paid by check	339.33
8-16-55	Book Balance	616.40
8-27-55	Book Balance	982.78
9-6-55	Statement rendered for balance due	27.0
9-6-55	Book Balance	1009.88
9-6-55	Statement rendered for balance due	1009.88
9-6-55	Book Balance	1311.93
(8-25-55	Paid by check	616.40
(		
(8-25-55	Book Balance	695.53
9-12-55	Book Balance	895.54
9-12-55	Statement rendered for balance due	37.49
9-12-55	Statement rendered for balance due	162.52
9-12-55	Credit C 68	366.38
9-12-55	Book Balance	529.16
9-12-55	Credit C 68	329.15
9-12-55	Book Balance	200.01
9-16-55	Credit C 69	200.01
9-16-55	Book Balance	-0-
9-19-55	Book Balance	102.14
9-19-55	Statement rendered for balance due	102.14
9-26-55	Book Balance	339.45
9-27-55	Book Balance	520.67
9-27-55	Statement rendered for balance due	520.67

Date	Transaction	Amount
9-27-55	Credit C 74	339.45
9-27-55	Book Balance	181.22
10-3-55	Book Balance	483.32
10-10-55	Book Balance	535.45
10-10-55	Book Balance	746.52
10-10-55	Statement rendered for balance due	746.52
10-11-55	Credit	483.32
10-11-55	Book Balance	263.20
10-17-55	Credit C 83	263.20
10-17-55	Book Balance	-0-
10-15-55	Book Balance	266.38
10-15-55	Statement rendered for balance due	266.38
10-26-55	Credit C 88	266.38
10-26-55	Book Balance	-0-
10-29-55	Book Balance	59.91
10-29-55	Book Balance	234.34
10-29-55	Statement rendered for balance due	234.34
11-4-55	Credit C 91	234.34
11-4-55	Book Balance	-0-
10-31-55	Book Balance	147.75
10-31-55	Statement rendered for balance due	147.75
10-31-55	Book Balance	186.36
10-31-55	Book Balance	238.47
10-31-55	Statement rendered for balance due	238.47
11-7-55	Book Balance	448.57
11-10-55	Credit C 93	248.15
11-10-55	Book Balance	200.42
11-14-55	Statement rendered for balance due	238.95
11-14-55	Book Balance	309.21
11-14-55	Statement rendered for balance due	309.21

[Title of District Court and Cause.]

MEMORANDUM

Plaintiff and defendant have each filed a motion for summary judgment, as to both causes of action.

The briefs, arguments and affidavits of the parties are interesting and enlightening, but they serve to point up the proposition that from them and the pleadings and admissions on file, there is serious factual dispute between the parties as to the first cause of action, so that it cannot be said that "there is no genuine issue as to any material fact," either as to the allegations of the first cause of action in the Complaint, or as to the special defenses raised by defendant in its answer.

The motions of both parties for summary judgment, insofar as they go to the first cause of action, will be denied.

As to the second cause of action on open book account, defendants also made a motion for judgment on the pleadings. Excluding all matters in the file outside the pleadings, it is alleged in the Complaint, and not denied in the answer, that the last shipments made by plaintiff for defendant were in February, 1957. It is alleged in the Second Count of Plaintiff's Complaint that "at all times herein mentioned," i.e., as the transactions of shipments occurred, "Plaintiff entered in its books of account its charges as shown on air bills issued by it." Plaintiff seeks to recover more than $12,000.00 not shown on those "air bills

issued by it," and alleges that the undercharges of more than $12,000.00 were not entered in its books of account until at least August, 1959—two years and seven months after it had entered in its books the charges shown on air bills issued by it to the defendant.

Such conduct does not amount to an open book account under the terms of the California Statute (Code of Civil Procedure §337a). See Costello v. Bank of America (9 Cir. 1957) 246 F. 2d 807, and Groom v. Holm (1959) 176 C. A. 2d 310.

Defendant's motion for judgment of dismissal on the pleadings as to plaintiff's second cause of action will be granted upon presentation of the proper form of judgment under the Rules.

That being so, the motions for both parties for summary judgment on plaintiff's second cause of action are moot, and on that ground are denied.

Counsel will prepare appropriate Orders consistent with this Memorandum, and serve the same under the Rules.

The Clerk will set the matter down for pre-trial on February 27, 1961, and the parties in the meanwhile will comply with the Local Rules in connection with pre-trial.

Dated: December 28, 1960.

/s/ PEIRSON M. HALL
United States District Judge

[Endorsed]: Filed Dec. 29, 1960.

United States District Court for Southern District of California Central Division

No. 1299-59-PH

CMAX, INC., also d.b.a. CITY MESSENGER OF HOLLYWOOD and CITY MESSENGER AIR EXPRESS,

Plaintiff,

vs.

DREWRY PHOTOCOLOR CORPORATION, a corporation,

Defendant.

JUDGMENT OF DISMISSAL OF SECOND COUNT OF COMPLAINT

The complaint herein having pleaded, in the Second Count thereof, a cause of action based upon an alleged open book account between plaintiff and defendant; defendant having moved for judgment on the pleadings as to the entire complaint and as to each count thereof on the ground, inter alia, that the pleadings establish that there is not any open book account between the plaintiff and the defendant; and said motion having regularly come on to be heard by the Court, and having been argued and briefed by counsel, and the Court, being fully advised in the premises, having filed its Memorandum stating the facts and conclusions with regard to said issue;

Now, it is hereby

Ordered, that the motion of defendant for judgment on the pleadings is granted as to the Second Count

in the Complaint; that said Second Count is hereby dismissed; that the said motion is denied as to the First Count of the complaint; that there is no just reason for delay in rendering and entering this judgment; and that this judgment be forthwith entered.

Dated: 1/23 1961.

/s/ PEIRSON M. HALL,
United States District Judge.

Affidavit of Service by Mail Attached.

[Endorsed]: Lodged Jan. 16, 1961. Filed and Entered Jan. 23, 1961.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that CMAX, Inc., also D.B.A. City Messenger of Hollywood and City Messenger Air Express, plaintiff above named hereby Appeals to the United States Court of Appeals for the Ninth Circuit from the judgment dismissing the Second Count of the complaint and entering judgement in favor of defendant on January 23, 1961 pursuant to Rule 54(b) of Federal Rules of Civil Procedure.

Dated January 26, 1961.

PHIL JACOBSON
H. J. BISCHOFF
/s/ By H. J. BISCHOFF,
Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Jan. 27, 1961.

[Title of District Court and Cause.]

CERTIFICATE BY THE CLERK

I, John A. Childress, Clerk of the above-entitled Court hereby certify that the foregoing documents together with the other items, all of which are listed below, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case:

Page:

62 Designation of contents of record on appeal, filed 2/16/61

Stipulation for deletion of item from designation of contents of record on appeal. 2/28/61.

Dated: March 3, 1961.

JOHN A. CHILDRESS, Clerk,

/s/ WM. A. WHITE,

Deputy Clerk.

[Endorsed]: No. 17298. United States Court of Appeals for the Ninth Circuit. CMAX, Inc., also D.B.A. City Messenger of Hollywood and City Messenger Air Express, Appellant, v. Drewry Photocolor Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: March 4, 1961.

Docketed: March 13, 1961.

/s/ FRANK H. SCHMID,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 17298

CMAX, Inc., also d.b.a., CITY MESSENGER OF HOLLYWOOD and CITY MESSENGER AIR EXPRESS,

Appellant

vs.

DREWRY PHOTOCOLOR CORPORATION, a corporation,

Respondent.

APPELLANT'S STATEMENT OF POINTS AND DESIGNATION OF RECORD ON APPEAL.

Comes now Appellant herein and sets forth the following points on which it intends to rely on appeal.

1. The trial court erred in holding on Respondent's motion for summary judgment that Appellant did not set forth the valid claim in Count 2 of its complaint.

2. The trial court erred in rendering judgment dismissing Second Count of complaint.

3. Appellant designates the following documents contained in the transcript of record on appeal material to the consideration of the appeal as follows:

Complaint beginning at page 2.

Answer beginning at page 6.

Defendant's motion for judgment on the pleadings and summary judgment beginning at page 12.

Affidavit of Elliot S. Fullman and attached exhibit beginning on page 47.

Memorandum of the Court beginning on page 55.

Judgment of dismissal of second count of complaint beginning on page 57.

Notice of appeal beginning on page 60.

Statement of Point.

Plaintiff's reply to Defendant's oral argument beginning at page 72 has been deleted by stipulation by both parties.

Dated: March 16, 1961.

PHIL JACOBSON
H. J. BISCHOFF
/s/ H. J. BISCHOFF
Attorneys for Appellant

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Mar. 17, 1961. Frank H. Schmid, Clerk.

No. 17,302

United States
COURT OF APPEALS
for the Ninth Circuit

ROBERT CHARLES CAULEY,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR THE APPELLEE

Appeal from the United States District Court for the District of Oregon.

C. E. LUCKEY,
United States Attorney,
District of Oregon,
JOSEPH E. BULEY,
Assistant United States Attorney,
Attorneys for Appellee.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE., 6-26-61—40

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STATUTES

CASES CITED

No. 17,302

United States
COURT OF APPEALS
for the Ninth Circuit

ROBERT CHARLES CAULEY,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR THE APPELLEE

Appeal from the United States District Court for the District of Oregon.

OPINION BELOW

Because of its brevity, the opinion below is here set forth verbatim except for the case entitlement.

No. C-18435
Opinion, December 12, 1960
SOLOMON, Judge:

"Defendant filed a motion under 28 U.S.C. § 2255, to vacate the sentence of six years imposed upon defendant in 1957 for violation of the narcotics law.

There is no merit in defendant's contention that he was not properly represented at the trial. Defendant was represented by an experienced, able and conscientious lawyer, but there is a limit to what any lawyer can do for a defendant when the evidence so clearly demonstrates his guilt.

The allegations that hearsay evidence was admitted and that the failure of the informer to testify deprived defendant of his constitutional rights are equally without merit. A government agent who observed the transaction testified. There is no requirement that the government call all witnesses to a transaction or that an informer must be called to testify. The testimony of only one witness is sufficient to establish any issue in the case.

Defendant's motion is denied."

JURISDICTION

Jurisdiction of the District Court was conferred by 28 U.S.C. § 2255 and Rule 35, Federal Rules of Criminal Procedure. Jurisdiction of this Court to review the judgment of the District Court is conferred by 28 U.S.C. §§ 2255 and 1291 and Rule 37[a] Federal Rules of Criminal Procedure.

STATUTES INVOLVED

Title 28 U.S.C. § 2255.

STATEMENT OF THE CASE

The appellant was indicted August 16, 1957 for narcotics violations, said indictment being in eleven counts. Subsequent thereto he was found guilty as to all counts by a jury verdict on September 16, 1957. On September 17, 1957 he was sentenced to a term of six years to each of said counts, said terms of imprisonment to run concurrently, and also that he pay a fine of $11.00. In November of 1960, appellant filed a Motion to Vacate Sentence and Judgment under 28 U.S.C. § 2255. Thereafter, on December 12, 1960, The Honorable Gus J. Solomon, Chief Judge of the United States District Court of the District of Oregon, denied said motion. His motion to the District Court to proceed *in forma pauperis* to obtain a transcript was denied, and his appeal to this Court to proceed *in forma pauperis* was also denied.

QUESTIONS PRESENTED

Apparently appellant raises the following questions:

(1) That the evidence was insufficient to convict;

(2) That he was represented by incompetent counsel at time of trial;

(3) That the officers had no warrant of arrest at the time he was arrested and searched.

ARGUMENT

I.

Was the Evidence Sufficient to Convict the Appellant?

The insufficiency or incredibility of evidence is not properly raised by the appellant's motion. As is said in *Black* v. *United States* (C.A. 9, 1959), 259 F.2d 38, cert. den. 80 S. Ct. 379, 361 U.S. 938, 4 L. Ed. 2d 357:

> "A sentence is not ordinarily subject to collateral attack in a § 2255 proceeding for errors of law which could have been corrected by an appeal."

The *Black* case therefore would seem to dispose of most of the appellant's complaints. However it is interesting to note that he refers to hearsay evidence although in his original motion he states that one of the agents saw the sales of narcotics to the informant. This could hardly be classed as hearsay evidence. As the District Court indicated there appears to be no requirement that the Federal officer's testimony be corroborated. Appellant also suggests that he should have been arrested during the course of one of the transactions. There is no requirement that the arrest be made at a particular given time, and it is submitted that there are several possible reasons for the delay of the arrest of the defendant. One reason may have been that the officers were endeavoring to make other sales involving this appellant, and also it could well be that they desired to continue to use the special employee as long as possible before his identity might be disclosed. Appellant also questions whether or not

the evidence found outside an apartment building could be used against him at the time of trial. Again it would seem that the *Black* case has the answer to this same problem and that in any event the evidence was quite probably admissible, although there might be some question of the weight of such evidence. Without a transcript of the evidence we have no way at this time of knowing the full story. For instance, were the appellant's fingerprints found on the evidence obtained outside his apartment? We submit that as to these items his proper procedure would have been by way of appeal and not by way of a proceeding of this type.

II.

Denial of Competent Counsel

Again the *Black* case would seem to dispose of this contention in that it is there stated:

> "This is not a ground for relief under Section 2255 unless it is shown that the attorney's conduct was so incompetent that it made the trial a farce, requiring the court to intervene in behalf of the client. *Latimer* v. *Crainor,* 9 Cir., 214 F.2d 926, 929. In denying the instant Section 2255 motion the District Court found that the conduct of Black's counsel at the trial 'was that of a skillful and experienced lawyer.' Our reading of the record confirms this view."

In this case the District Court found that the defendant was represented by an experienced, able and conscientious lawyer. This would therefore seem to dispose of this problem. See also *Kenneth J. McDonald* v. *U. S.* (9 Cir., 1960), 282 F.2d 737. Particularly

is this true when we do not have a transcript of the evidence and remarks made at the time of trial. In that regard the appellant complains that the informer was not produced. It is submitted that the appellant had ample time to ascertain the informant's whereabouts and obtain a deposition if he so desired prior to time of trial, rather than raising that question on the morning of trial. Also there is no reason to believe that the informer's testimony would have aided the appellant's cause in any manner. There was no showing that the government in any way prevented the informer from appearing. Apparently from the appellant's own statements in this proceeding the informer was in prison in Canada and therefore could obviously not have appeared at the time of trial. Again, we submit that this is another instance that his proper procedure would have been by way of appeal rather than by this type of proceeding.

III.

Was It Necessary that the Federal Agents Have a Warrant for the Arrest of the Appellant?

Again the *Black* case holds that such a contention is inappropriate in this type of proceeding but should have been raised by way of appeal. Also the case *Draper* v. *United States* (1959), 358 U.S. 307, 79 S. Ct. 329, 3 L. Ed. 327, clearly holds that a warrant of arrest is not necessary for a Federal Narcotics Agent to make an arrest. Beyond that it is hard to understand how the appellant reasons that he is now entitled to have his sentence vacated when from his own

statements he says that no evidence was found in his residence or in his automobile. Therefore it is hard to understand how he could have been prejudiced at time of trial if such were true. Also in this regard it does not seem that it is necessary for the Court to answer the question as to whether or not the Federal Agents had the right to seize the appellant's automobile. It would appear from his own statements that the Federal Narcotics Agents had probable cause to arrest the appellant without a warrant in that the agent had viewed sales between the Special Employee and this appellant through holes in a door.

CONCLUSION

From the contentions made by the appellant, and although there is no transcript of the evidence of the trial, it fully appears that the District Court's summary dismissal of the appellant's Motion to Vacate Sentence and Judgment was proper and that the Court's order should be upheld.

It is respectfully submitted, therefore, that appellant's appeal herein should be dismissed, or, in the alternative, the District Court's summary dismissal of the motion should be affirmed.

C. E. LUCKEY,
United States Attorney,
District of Oregon,
JOSEPH E. BULEY,
Assistant United States Attorney,
Attorneys for Appellee.

No. 17303

United States Court of Appeals

For the Ninth Circuit

FIRST FEDERAL SAVINGS & LOAN ASSOCIATION, OF BREMERTON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION,.

BEFORE THE HONORABLE JUDGE WILLIAM J. LINDBERG

APPELLANT'S OPENING BRIEF

MARION GARLAND, JR.
Counsel for Appellant.

Office and Post Office Address:
206 Dietz Building,
Bremerton, Washington

DICKSON-FLETCHER BREMERTON, WASH.

ROPOSAL TO LEASE QUARTERS

...al Postmaster General,
Washington 25, D. C.

June 25, 1955
(Date)

The undersigned hereby agrees to lease the premises described below for a term of Ten (10) years from October 21, 1955, or date thereafter of completion of building or any contemplated improvements, additions, etc., but not later than 20 days after acceptance of this proposal by the Post Office Department for the use of the post office at Winslow, Washington at a rental of Fifteen hundred dollars ($1,500.00) per annum, payable monthly and subject to the provisions of form 1400-a which is attached hereto, and which has been carefully read by the undersigned, except that ---:

First floor 26 feet 4 inches by 88 feet 8 inches, providing 2,335 sq. ft. net;
Basement or cellar } --- feet --- inches by --- feet --- inches, providing --- sq. ft. net;

of the one story Concrete Block building known as ---
No. --- Winslow Way Street, lot No. one, block No. None, on the North side of Winslow Way Street, between Bricknell Street and Madison Road Street; on the --- corner of --- Street and --- Street,
in Winslow, Kitsap County, Washington.

Dimensions and location of any additional spaces or adjoining ground areas which proponent agrees to provide:
An asphalt-paved driveway 14' wide on east side of building from Winslow Way, extending to an asphalt-paved area at rear of building, 41' wide by 50' deep, adjacent to a concrete loading apron 10' deep by 27' wide at rear of building, for vehicle access, maneuvering and parking.

I further agree, in consideration of the rental hereinbefore specified:

(a) To furnish satisfactory fuel, heat, light, water, janitor and sewerage service;
(b) To furnish the lawn, fixtures, furniture and safe as listed on Form 1235 (Sheet) (Other new articles and equipment as are included or other appropriate wording)
(c) To furnish the specified toilet facilities, plumbing, heating, and lighting fixtures as listed on Form 1235 (Sheet) per attached addendum
(d) To provide the necessary gas, electric, and water meters;
(e) To equip the premises in accordance with the building requirements as listed on Form 1235 (Sheet) per attached addendum
(f) To furnish ---
(g) To furnish ---

and to keep the premises, and all items listed above in paragraphs (b) to (g), inclusive, in good repair and proper condition, to the satisfaction of the Post Office Department during its occupancy of the premises.

I will have the room or rooms ready for occupancy by the post office on the date specified above as the beginning of the proposed term of lease, provided notice of the acceptance of this proposal by the Post Office Department is promptly received.

SEE ATTACHED ADDENDUM

(SEAL)

/s/ James E. Comrade
(Signature of proponent in full)

/s/ Florence E. Comrade
(Signature of wife or husband, if married, of officer, or member of firm)

(Signature of officer, or member of firm)

P. O. Box 144, Winslow, Washington
(Address of proponent)

Proposal No. 4
(To be filled in by Inspector)

Note.—Wife or husband must join proponent, if married, to subordinate dower rights. If proponent is a municipality, fraternal order, or other corporation, proposal must be signed by the officers authorized by law or by the by-laws of the organization to sign such instruments and must bear the impression of the proponent's seal.

The contractor, in performing the work required by this contract, will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The contractor shall include, in all subcontracts a provision imposing a like obligation on subcontractors.

ACCEPTANCE BY THE GOVERNMENT.

Accepted ---

Signed) Rollin D. Barnard
Assistant Postmaster General.

AUG 10 1955
(Date)

16—81161-8

No. 17303

United States Court of Appeals

For the Ninth Circuit

FIRST FEDERAL SAVINGS & LOAN ASSOCIATION, OF BREMERTON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION,
BEFORE THE
HONORABLE JUDGE WILLIAM J. LINDBERG

APPELLANT'S OPENING BRIEF

MARION GARLAND, JR.
Counsel for Appellant.

Office and Post Office Address:
206 Dietz Building,
Bremerton, Washington

DICKSON-FLETCHER BREMERTON, WASH.

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION,
BEFORE THE
HONORABLE JUDGE WILLIAM J. LINDBERG

APPELLANT'S OPENING BRIEF

STATEMENT OF THE PLEADINGS

United States Attorney on behalf of the post office department, filed a complaint in the Western District of Washington, Northern Division, and secured jurisdiction under 28 USCA 1345 and 28 USCA 2201 (Tr. 4).

The appeal to this court is authorized under 28 USCA 1291. The complaint of the United States post office department and the answer of First Federal Savings and Loan Association of Bremerton are not set out in the transcript. All matters of pleadings and issues were settled by the pre-trial order (Tr. 3 through 19).

STATEMENT OF THE CASE

The post office department, according to Rules laid down by the Postmaster General, was in 1955 and 1956, locating a new post office in Winslow, Kitsap County, Washington (Tr. 5).

There was a bid where persons offered to lease premises meeting the post office department specifications. A Mr. Comrada was the successful bidder for the post office lease (Tr. 5). The subject matter of the lease was a building to be built at an annual rental of $1,480.00 for five (5) years with an option on the part of the post office to renew at an annual rental of $1,320.00 for an additional five (5) years (Tr. 5). Comrada hired Sands to construct the post office building for $22,239.99 (Tr. 8). Comrada and Sands quarreled (Tr. 8 and 9), and took their troubles to court (Tr. 9). Comrada conveyed to Sands the property upon which the post office was being built (Tr. 7).

On July 25, 1956, Sands was the record holder of the title to the property on which the post office building was being built (Tr. 6 and 9).

Sands mortgaged to First Federal Savings and Loan Association of Bremerton, the appellant, the post office property and property adjacent thereto for $21,000.00. Sands needed an additional $8,000.00 to construct the post office (Tr. 6 and 9), and the balance to cover an existing mortgage.

Appellant foreclosed the mortgage and purchased at foreclosure sale on March 25, 1960 (Tr. 3). United States was a party to this suit and moved the case to the Federal court and then asked to be dismissed from the suit (Tr. 7).

On December 1, 1956, the post office began to occupy the post office building, even though the same was not fully completed, and has been in occupancy ever since (Tr. 7). The post office has not had a lease on the premises at any time (Tr. 6 and 42). The post office has not paid or tendered any rent to the appellant (Tr. 8).

At the time the appellant made the loan, they knew a post office building was being built, but were informed by Sands that the post office did not have a lease (Tr. 10 and 11). The appellant did not inquire

of the post office department whether they had a lease on the premises (Tr. 11).

On November 9, 1956, before the post office department occupied the building in any way, they asked the appellant to sign a subrogation of mortgage (Tr. 11). The appellant refused to sign (Tr. 11).

The post office claims its right to possession, because of the negotiations carried on under an agreement executed by the post office and Mr. Comrada on Government Form 1500, known as Exhibit 1 (Appx.). This instrument was not recorded or signed by the appellant (Exhibit 1, appendix).

Under the law of the State of Washington, a lease for a term of years to be valid, must be signed and notarized, otherwise it is a month to month tenancy. *Labor Hall Ass'n, Inc. v. Danielsen*, 24 Wn. (2d) 75, 163 P. (2d) 167. (1945). *Hansen v. Central Inv. Co.*, 10 Wn. (2d) 393, 116 P. (2d) 839 (1941).

The actual rental value of the premises was established by the experts, to be between $250.00 and $330.00 per month (Tr. 95, 116, 129, 135).

Appellant claims that State law applies and there is no lease. The post office department claims that the regulations of the Postmaster General are the law:

that appellant had imputed knowledge of the proposal to lease: that because of said imputed knowledge the appellant is held to the terms of the proposal and must carry out the agreement by entering into a lease at $123.00 per month.

Further, appellant claims that even though there may be a breach of contract on the part of other parties, a court of equity should not specifically enforce to such an inequitable agreement.

The claims of each party are denied by the other party.

ASSIGNMENTS OF ERROR

1. Court erred in applying the federal regulations, rather than the state law.

2. The court erred in making Findings of Fact No. 20 as follows:

> "* * * First Federal Savings and Loan Association had actual notice of the proposal to lease quarters, the agreement between the government and the Comradas, and that therefore they did not have the status of a bona fide purchaser or of a bona fide encumbrance. The actual notice consisted of implied or inquiry notice, that is, both Sands and First Federal Savings and Loan Association had knowledge of facts which would excite a prudent man to make further reasonable inquiry, and such an inquiry, if made, would have

disclosed the interest which the government had in the subject property. Therefore, * * * First Federal Savings and Loan Association are charged with having actual knowledge of the existence of the government's and Comrada's agreement to lease and they acquired their respective interests in the property subject to the interest of the United States."

3. The court erred in making Findings of Fact No. 21, on page 40 and 41 of Transcript as follows:

"Information concerning both the existence of the agreement to lease and the terms of the lease contemplated by the agreement to lease was reasonably available to any properly interested person and could have been secured from either the postal inspector or the local postmaster and presumably from James E. Comrada. Had inquiry been made by Sands or First Federal Savings and Loan as to the particulars of any rental or lease arrangement existing with respect to the building, under construction, full information would have been forthcoming."

4. The court erred in making that portion of Findings of Fact No. 22 on page 41 of transcript as follows:

"The proposal to lease quarters as amended and accepted by the government is a valid and enforceable agreement to execute a lease in the future. The terms of such agreement are sufficiently defi-

nite, complete and certain so as to meet the requirements of a contract that may be specifically enforced."

5. The court erred in making Findings of Fact No. 24, page 42 of transcript as follows:

"The government was under no duty to record the proposal to lease quarters agreement and this fact does not impair the government's eligibility for equitable relief in this case."

6. The court erred in making Findings of Fact No. 26, page 42 of transcript as follows:

"First Federal Savings and Loan did not perform their duty of making reasonable inquiry when they asked Sands if the government had a lease. Prudent banking practice demands more than accepting without further investigation a prospective borrower's statements as to the facts surrounding his security."

7. The court erred in specifically enforcing the contract entered into by Comrada, by requiring First Federal Savings and Loan to execute a lease. The contract was such that the court of equity, should not in good conscience, grant specific performance.

ARGUMENTS

Assignment of Error No. 1.

Assignment of error No. 1 raises a question of state law v. federal rules. The trial court held that the rules of the Postmaster General were to be the law in the case, and that the law of the State of Washington did not apply.

If the Honorable trial Judge erred on this point, the rest of the "Assignments of error" need not be considered.

In the case at bar, the post office relies on Exhibit 1 (appendix), which is an agreement to make a lease. The post office, therefore, has no lease under the Washington Statutes of Frauds, which require acknowledgment.

> "R.C.W. 64.04.010 Conveyances and encumbrances to be by deed. Every conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed: * * * ."
>
> "R.C.W. 64.04.020 Requisites of a deed. Every deed shall be in writing, signed by the party bound thereby, and acknowledged by the party * * *."
>
> "R.C.W. 59.04.010 Tenancies from year to year abolished except under written contract. * * *

Leases * * * shall be legal and valid for any term or period not exceeding one year, without acknowledgment * * *."

Hanson v. Central Inv. Co., 10 Wn. (2d) 393, 116 P. (2d) 839 (1941), page 394 is as follows:

* * *

"(1) The only question presented upon this appeal is whether the modification agreement should have been acknowledged before a notary public. Rem. Rev. Stat., P 10618 (P.C.P. 3553), provides that leases "shall be legal and valid for any term or period not exceeding one year, without acknowledgment, witnesses, or seals."

In the case of *Omak Realty Investment Co. v. Dewey*, 129 Wash. 385, 225 Pac. 236, it was distinctly held that a lease of real estate for a period longer than one year, unacknowledged, only created a tenancy from month to month, *and that the same rule applied to a contract to execute a lease.* The present case is controlled by the holding in that case." (Italics mine)

The Federal law granting power to the Postmaster General is set forth in 39 USCA 794f:

"794f. LEASES, DONATIONS, AND REWARDS:

In the performance of, and with respect to, the function, powers and duties vested in him, the Postmaster General may —

(1) Enter into such leases of real property as may be necessary in the conduct of the affairs

of the Department on such terms as he may deem appropriate, without regard to the provisions of any law, * * *."

In deciding on the question of state law v. Federal departmental rules, Judge Lindberg adopted the reasoning of the Ninth Circuit in *U.S. v. View Crest Gardens*, 268 Fed. (2d) 380 (1959).

The question there involved was Federal FHA rules vs. State law as to the appointment of a receiver pending mortgage foreclosure. The regulation of FHA allowed a receiver and State law did not. This Ninth Circuit reasoned on page 382 as follows:

"* * * But we do find it to be clear that the source of the law governing the relations between the United States and the parties to the mortgage here involved is federal. *Clearfield Trust Co. v. United States*, 318 U.S. 363, 63 S. Ct. 573, 87 L. Ed. 838; *United States v. Allegheny County*, 322 U.S. 174, 64 S. Ct. 908, 88 L. Ed, 1209; *United States v. Matthews*, 9 Cir., 1957, 144 F. 2d 626; *McKnight v. United States*, 9 Cir., 1958, 259 F. 2d 540. Cf. *Bank of America Nat. Trust & Sav. Ass'n v. Parnell*, 352 U.S. 29, 77 S. Ct. 119, 1 L. Ed. 2d 93. It is therefore equally clear that if the law of the State of Washington is to have any application in the foreclosure proceeding it is because it applies of its own force, but because either the Congress, the FHA, or the Federal Court adopts the local rule to further federal

policy. As it is made certain in the cases just cited, this action arises under federal law, and not as an action between persons of diverse citizenship, hence the rule of *Erie R. Co v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 is inapplicable. Nevertheless state law is sometimes adopted to fulfill the federal policies involved. As the Supreme Court of the United States stated in *Clearfield Trust, supra*, 'in our choice of the applicable federal rule we have occasionally selected state law.' But not when 'the desirability of a uniform federal rule is plain.' 318 U.S. at page 367, 63 S. Ct. at page 575."

A case reaching a different conclusion applying the principles of law is *United States v. Brosnan, and Bank of American National Trust and Savings Association v. United States*, 80 Supreme Court Reporter, page 1108 (July 1960). The question in the Brosnan case was whether state or federal law should apply in determining the validity of a state mortgage foreclosure over a federal tax lien. This case involved a combined appeal to the U.S. Supreme Court from the Ninth Circuit and from the Third Circuit.

The court reasoned as follows on pages 1111 and 1112:

"(5, 6) We nevertheless believe it desirable to adopt as federal law state law governing divesti-

ture of federal tax liens, except to the extent that Congress may have entered the field. It is sure that such liens form part of the machinery for the collection of federal taxes, the objective of which is 'uniformity, as far as may be.' *United States v. Gilbert Associates*, 345 U.S. 361, 364, 73 S. Ct. 701, 703, 97 L. Ed. 1071. However, when Congress resorted to the use of liens, it came into an area of complex property relationships long since settled and regulated by state law. We believe that, so far as this Court is concerned, the need for uniformity in this instance is outweighed by the severe dislocation to local property relationships which would result from our disregarding state procedures. Long accepted nonjudicial means of enforcing private liens would be embarrassed, if not nullified where federal liens are involved, and many titles already secured by such means would be cast in doubt. We think it more harmonious with the tenets of our federal system and more consistent with what Congress has already done in this area, not to inject ourselves into the network of competing private property interests, by displacing well-established state procedures governing their enforcement, or superimposing on them a new federal rule. *Cf. Board of Com'rs of Jackson County v. United States*, 308 U.S. 343, 60 St. Ct. 285, 84 L. Ed. 313.

III

(7) This conclusion would not, of course, withstand a congressional direction to the contrary."

I would paraphrase the present state of the law as follows: If Congress has not decreed otherwise, the federal court shall apply state law or federal law, depending on whether "established property rights" or the federal "government's desirability for uniformity" would do the most justice in each individual case.

Applying the facts of the case at bar to the above law, we find that Congress in delegating authority to the Postmaster, 39 USCA 794f, let him make "terms" of "leases" without regard to any law, but did not give him authority in making rules to abandon the formalities of leases as required by state law. The Postmaster can make leases embodying such terms as he sees fit, but he still is not specifically given the authority to ignore the requirements of instruments that are executed to carry out these terms.

Since Congress has not directed the Postmaster to ignore state requirements of leases and his rules have done so, this court must decide whether the government's "desire for uniformity" or "state laws of property" would be the best to apply in this particular case.

The facts to which the law is to be applied are:

Van Buskirk, a real estate manager for the post office (Tr. 6), testified that agreements such as Ex-

hibit 1, were used in all states (Tr. 5), and that at the present time about 600 to 1,200 such proposals are used a year (Tr. 66). In 1956, at the time the appellant took its mortgage, there were ten such agreements in the whole United States (Tr. 78). There had been before this time, one in the State of Washington (Tr. 79). There was the further fact that some occupancies of post offices were month to month tenancies, with no leases or such agreements as Exhibit 1. (Tr. 80).

This court can take judicial knowledge of the thousands of leases that are executed in each state each year and the fact that title companies, banks and all other dealers in real property, look to the law of the state to determine the validity of the instruments with which they deal.

The post office does an infinitesimal small part of business, yet they submit this small amount of business need not conform to state laws in the expediency of uniformity. Everyone must read their rules and forms and comply with them.

The post office is only one branch of government. If its agreements need not comply with state law then neither must any of the agreements of the hundreds of other departments of government. No one should

be put to the burden of knowing the rules of each government department when they deal in leased real property.

It is up to this court to determine whether this hardship is of greater weight than the desirability of uniformity on the part of the government.

ARGUMENT OF ASSIGNMENTS OF ERROR 2, 3, 4 and 6

These assignments all pertain to Findings of Fact and Conclusions that First Federal Savings and Loan Association of Bremerton, the appellant, had implied knowledge of the agreement (Exhibit 1) to make a lease. It is admitted that there was no actual "knowledge and no recording of the instrument." (Tr. 39)

If state law prevails over federal rules in this case, the assignments 2 through 7 are no longer of importance. The knowledge it is alleged the appellant had, was knowledge of an instrument which was not enforceable as a lease under state law.

However, even if the federal rule prevails, the instrument (Exhibit 1) would only be binding on the appellant if the appellant had actual or implied knowledge of the instrument when they made their mortgage. *Holsell v. Renfrow*, 207 U.S. 287 (1906).

The knowledge that the appellant had, is well set out in the admitted Facts No. 25 and 26 (Tr. 9 and 10), as follows:

> "25. On July 17, 1956, Earl L. Sands applied for a mortgage loan on the property described in paragraph 9 of Admitted Facts herein referred to as the post office property in the amount of $8,000, from First Federal Savings and Loan Association of Bremerton. At that time First Federal Savings and Loan Association of Bremerton held an existing mortgage on which the balance due was $12,454.12 on the adjacent "restaurant property." The loan application was amended to provide for a loan of $21,000, to be secured by the mortgage of both the restaurant and post office property, and that $12,454.12 of such loan would be used to satisfy the existing encumbrance on the restaurant property.
>
> In the loan application the improvements located on the real estate were designated as a restaurant built in 1955, and a post office built in 1956. The post office was described as having one (1) room and being of concrete block exterior finish. It was stated in the loan application that $8,454.88 of the loan proceeds were to be used for "completing building the above-described post office." At the time of making application for the loan, Earl L. Sands stated to Miss E. A. Sprague, an assistant secretary of the savings and loan association, that there was an existing lease of the restaurant to James Comrada for a rental of $375.00 per month,

*but that there was no lease of the adjacent post office property.** Mr. Paul Rosenbarger, president of the savings and loan association, personally made a physical inspection and appraisal of the real estate that Sands offered as security for the loan. This physical inspection disclosed two improvements on the subject property. (*Italics mine)

* * *

> A post office, 27 feet by 74 feet, which improvement was appraised at $16,453 (when completed).

The post office was approximately 50 per cent completed. Mr. Rosenbarger knew that the building was being built for occupancy as a United States Post Office, and designated the building as a post office in his appraisal resport.

First Federal Savings and Loan Association did not inquire of the Post Office Department or of any person other than Sands, the mortgagor, whether the Post Office Department had a lease agreement prior to accepting the loan.

First Federal Savings and Loan Association of Bremerton insured the mortgage from Sands, dated July 25, 1956, by a title insurance policy secured from the Kitsap County Title Insurance Company (Policy No. H-78255-B, ATA form dated August 28, 1956). An employee of the title insurance company physically inspected the property to be mortgaged and observed that the building under construction was to be used as a post office.

> 26. On or about November 9, 1956, the defendant First Federal Savings and Loan Association of Bremerton, was requested to sign a form acknowledging that the mortgage of July 25, 1956, executed by Sands, was subordinate to the lease of the Post Office Department. The First Federal Savings and Loan Association of Bremerton declined to execute the subordination agreement.

There were other post offices in the area, which were not under leases (Tr. 62, 79 and 80).

The Findings of Fact which I have excepted to, might be construed as Conclusions of Law, as they are the interpretations put on the facts which were admitted in the Admission of Fact.

The rule that the trial court saw the witnesses and heard the testimony, is not brought into play in this case, because the facts are under a pre-trial order of Admission of Fact. Knowing that the trial court saw the witnesses does not affect the Admission of Fact in any way.

This court can interpret the facts and draw its own Conclusions, as well as the trial court. The rules pertaining to this set of facts is as well set forth in *Diimel v. Morse*, 36 Wn. (2d) 344, 218 P. (2d) 334 (1950), quoted on page 347:

"* * * An encumbrancer, without notice of existing equities, may rely on the record chain of title, and, in the absence of notice, is not bound to go outside the records to inquire about them. *Burr v. Dyer*, 60 Wash. 603, 111 Pac. 866.

* * *

(5) We are satisfied that the evidence in the record clearly preponderates against the finding that Welch's attorney was also the agent of Kafflen. He represented Welch only. Kafflen may have been extraordinarily credulous, but notice of things he did not know will not be imputed to him on the basis of the knowledge of Welch's attorney. *Kafflen was on the premises, but he was not required to inquire of the tenants concerning the title of the property. Rehm v. Reilly*, 161 Wash. 418, 297 Pac. 147, 74 A.L.R. 350." (Italics mine).

Also the case of *Burgess v. Independent School District No. 1*, Okl. 336 P. 2d 1077 (1959) as follows:

"(8, 9) The trial court having determined, in effect, that defendant school district made a diligent inquiry and such finding having been by us approved, such defendant is to be regarded as having acted bona fide and without notice of the interests of the plaintiffs in the land in controversy.

"When a person has notice of circumstances which put him upon inquiry, and he actually makes due inquiry into the circumstances and either fails to discover the existence of any rights in conflict with his own or becomes satisfied that

the suspicions which have been awakened are unwarranted, or that a change in the circumstances has obviated the grounds of his apprehension, he is to be regarded as having acted bona fide and without notice of the fact. * * * "

— 66 C.J.S. Notice P 11, p. 645.

"The presumption or implication of notice, based upon the rule heretofore stated that notice of facts putting one on inquiry is notice of the facts which such inquiry would have revealed, is not a conclusive one. If it appears that the person sought to be charged with notice was not heedless of the warning signals, but made inquiry and used due diligence to discover the facts which were suggested by the facts of which he had knowledge, and yet failed to obtain knowledge thereof, the inference of notice is rebutted and he is not affected thereby."

— 39 Am. Jur. Notice, P. 14.

"It is as well established, as it would seem to be apparent, that diligent but fruitless investigation into the existence of the facts concerning which one is put upon inquiry places the unsuccessful questant once more in the position of immunity from notice. In the language of Judge Selden in a leading case (*Williamson v. Brown*, 15 N.Y. 354):

" 'The phraseology uniformly used, as descriptive of the kind of notice in question, sufficient to put the party upon inquiry, would seem to imply that if the party is faithful in making

inquiries, but fails to discover the conveyance, he will be protected. The import of the terms is, that it becomes the duty of the party to inquire. If, then, he performs that duty is he still to be bound, without any actual notice?'

"Hence an instruction that one is affected with notice if he has knowledge of facts sufficing to put him on inquiry is erroneous for its failure to discover the effect of inquiry honestly and efficiently prosecuted. The therapeutic powers of diligent research are unimpaired by the facts that the information received was inaccurate or that the informant did not possess complete information concerning the motive for the interrogation. As a corollary, even though no inquiry be made, if in fact it would have been fruitless, notice does not arise from the knowledge of inquiry-provoking circumstances.

Actually the knowledge that the appellant had was that a building was being built for occupancy by the post office. That the owner of the building stated truthfully that there was no lease. The title insurance company searched the record and found no evidence of a lease. There were many tenancies in the area where the post office did not have a lease. (Tr. 62, 79, 80 and 97).

There was a building being built which was going to have two occupants. One had given notice of his lease and the tenant and landlord acknowledged that

there was a lease. Why should a person making a loan go beyond the record and the word of a landlord, when there is no one in possession, nothing to show that the post office department would, in fact, ever occupy the premises, even though it was being built for post office occupancy.

It is up to this court to decide what is reasonable business procedure for a financial institution.

I submit that the only way to do this is to search the record and inquire of the people in possession and not to look up any person for whom the building might be suitable for occupancy. This puts an unreasonable burden on the financier.

ARGUMENT AS TO ASSIGNMENT OF ERROR No. 5 and 7

This argument is that a court of equity, should not specifically enforce an agreement against a person not a party to the agreement when the equities are as hereinafter set forth.

First, before the post office moved into the premises being leased, it knew of the appellant's mortgage on the premises and asked that the appellant subrogate its mortgage (Tr. 11).

This the appellant refused to do. Even so, the post office department went into possession, knowing these facts (Tr. 7). The post office knew that they were securing a rental for the premises at $123.33 per month, which is not enough to even pay the interest on the loan, pay the taxes, insurance and upkeep and does not even commence to amortize the loan (Tr. 100). A reasonable rental would have been somewhere between $250.00 and $333.00 per month (Tr. 116, 129 and 135).

Mr. Comrada who made the lease was so ignorant of business, that he first had a lease for $1,500.00 a year and could not finance the building, so the post office talked him into a $1,480.00 lease with a five (5) year option at $1,320.00 (Tr. 71 and 72).

The post office does not have any other lease at so low a figure when compared on a square foot basis. This agreement is $0.71 per annum per square foot and all other comparable post offices are from $0.94 to $1.31 a square foot. (Tr. 143 and 144 and Exhibit 1)

There is no allegation of fraud. There is a dealing by the post office through its regional estate manager (Tr. 61), whereby he secured an unfair lease (Tr. 95, 116, 129 and 135) from a poor business man as lessor (Tr. 71, 72). The post office had an unrecorded

instrument that is not a lease, on post office form (Tr. 11 and Exhibit 9), and went into possession knowing that the appellant had a mortgage on the premises that the appellant would not subrogate to the post office's alleged lease (Tr .11).

The appellant inquired of the lessor if there was a lease and examined the premises (Tr. 10), and secured title insurance (Tr. 11). There were other post office occupancies in the area without a lease (Tr. 97, 79 and 80).

A recent Washington case, *John M. Nelson, et al., Appellants, v. Dorothy Frieda Nelson, Respondent,* 157 Wash. Decisions Advance Sheet. (No Pacific citation available)

> "* * * Against the trial court's conclusion that this contract was unconscionable and should not be enforced, the plaintiffs argue that they are entitled to a decree of specific performance, as a matter of right, since there is no fraud or fiduciary relationship established. It is urged that the earnest money receipts are clear and unambiguous; that the defendant could not have been misled thereby, and that no more is involved here than an attempt by the defendant to repudiate a bad bargain.
>
> "We are, however, convinced that there is more involved than a bad bargain. Not only was there

a misunderstanding by the defendant, as to the amount of her equity in the Boyston Avenue propperty, but there was an 'overkeenness' (a most expressive word cribbed from *Kirkpatrick v. Pease* (1907), 202 Mo. 471, 101 S.W. 651) on the part of the plaintiff Levy, whetted by his expressed intention 'to get even with' the defendant.

* * *

"In *Gilman v. Brunton* (1916), 94 Wash. 1, 161 Pac. 835, the trial court had, as here, dismissed an action for specific performance. We affirmed, saying, inter alia (p. 8):

'Nor can it be said that respondents are estopped by their examination of the lands to deny appellant's right to specific performance. This is not a case of rescission of an executed contract, in which courts are slow to grant relief where the proof of fraud is not clear and convincing and the complaining party has already consummated the contract after an inspection of the land. It is a case where resort is had to a court of conscience to enforce performance of an executory contract which would impose an inequitable burden upon one of the parties. If the contract is shown to be unconscionable, inequitable and unfair, it is the duty of the court to deny enforcement, although the evidence might not be sufficient to justify rescission in the case of an executed contract. Taking the evidence most favorable to the appellant, it discloses that he is seeking to compel respondents to pay for property more than $3,000 in excess of its fair value. Even if there

may not have been actionable fraud on the part of appellant, still a court of conscience will not lend its aid to the enforcement of a contract which is manifestly unfair. If the appellant deems himself injured, there remains to him his remedy in an action at law for damages for breach of contract. The law on this subject is well expressed by one of the standard text books as follows:

"'So a court of equity will not lend its aid to enforce a contract which is in any way unfair, inequitable or unconscionable. And gross inadequacy of consideration may be sufficient to justify the court in refusing a decree for specific performance even though there is no such fraud or the like as would require a cancellation. The contract may be perfectly legal, and yet it will not be specifically enforced if it is unreasonable or unconscionable, or if its enforcement will work a hardship or injustice to one of the parties.'"

* * *

" A multiplicity of support citation adds little to a case of this character, for, as we said in *Voight v. Fidelity Inv. Co.* (1908), 49 Wash. 612, 614, 96 Pac. 162 (another case in which we affirmed the trial court's refusal to grant specific performance).

'. . . the decision of controversies of this character must of necessity depend largely upon the circumstances surrounding each particular case. The cases are of equitable cognizance and the rules governing them must be more or less flexible...'"

On the above facts and law as we see it, a court of equity should not specifically enforce this contract against the appellant. There may be a breach of contract according to law and the post office entitled to an award for damages from other parties, but equity should not step in and enforce an inequitable contract.

CONCLUSION

State law should apply to the laws governing the form of leases. These laws are fundamental to property rights. The post office department through its rules should not change requirements as to leases and render useless all accepted means of getting good security on property.

Second, when the appellant has had a title search and examined the premises and found no one in possession (but did find a building suitable for a post office) and inquired of owner as to a lease, it should not be said to have imputed knowledge of an unrecorded instrument, that if specifically enforced would lead to the execution of a lease.

Lastly, a court of equity should not specifically enforce contracts against third parties in such inequitable circumstances.

Respectfully submitted,
MARION GARLAND, JR.,
Attorney for Appellant.

No. 17,303

In the United States Court of Appeals for the Ninth Circuit

FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF BREMERTON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF FOR THE UNITED STATES

RAMSEY CLARK,
Assistant Attorney General.

CHARLES P. MORIARTY,
United States Attorney,
Seattle, 4, Washington.

JAMES F. MC ATEER,
Assistant United States Attorney,
Seattle 4, Washington.

ROGER P. MARQUIS,
RAYMOND N. ZAGONE,
Attorneys,
Department of Justice,
Washington 25, D. C.

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OPINION BELOW

The district court's memorandum opinion and findings of fact and conclusions of law appear at pages 20 and 35 of the printed record.

JURISDICTION

This case involves an appeal from a declaratory judgment obtained by the United States. The district court had jurisdiction under 28 U.S.C. sec. 1345. Its judgment was filed on December 5, 1960 (R. 45). Notice of appeal was filed on February 3, 1961 (R. 48). The jurisdiction of this Court rests on 28 U.S.C. sec. 1291.

QUESTIONS PRESENTED

1. Whether the appeal should be dismissed because:

a. Appellant has voluntarily conveyed all its interest in the subject matter of the case.

b. The Anti-Assignment Act forecloses prosecution of the appeal by appellant's grantee.

2. Whether the district court properly rejected the application of state law to the postal lease agreement entered into by the United States and appellant's predecessor in interest.

3. Whether the district court's finding and conclusion, supported by substantial evidence, that appellant had actual notice of the interest of the United States in the property under the agreement to lease and thereby acquired its interest subject to the interest of the United States can be set aside on the appeal.

4. Whether the district court correctly decreed specific performance of the agreement to lease, the terms of which are sufficiently definite and equitable.

STATUTES INVOLVED

The relevant portion of the Anti-Assignment Act, R.S. sec. 3477, as amended, 31 U.S.C. sec. 203, provides:

§ 203. Assignments of claims; set-off against assignee.

> All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the considera-

tion therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, except as hereinafter provided, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. * * *

* * * * *

The relevant portion of the Act of August 17, 1950, 64 Stat. 462, 39 U.S.C. sec. 794f, provides:

§ 794f. Leases, donations, and rewards.

In the performance of, and with respect to, the functions, powers, and duties vested in him, the Postmaster General may—

(1) enter into such leases of real property as may be necessary in the conduct of the affairs of the Department on such terms as he may deem appropriate, without regard to the provisions of any law, except those provisions of law specifically applicable to the Department * * *.

* * * * *

The relevant portion of the Act of July 22, 1954, 68 Stat. 523, 39 U.S.C. sec. 903, provides:

§ 903. Term-lease agreements for erection of buildings; acquisition and disposal of real property; use of rental funds.

(a) The Postmaster General is authorized to—

(1) negotiate and enter into lease agreements with any person, copartnership, corporation, or other public or private entity, which do not bind the Government for periods exceeding thirty years for each such lease agreement, on such terms as the Postmaster General deems to be in the best interests of the United States, for the erection by such lessor of such buildings and improvements for postal purposes as the Postmaster General deems appropriate, on lands sold, leased, or otherwise disposed of by the Postmaster General to, or otherwise acquired by, such person, copartnership, corporation, or public or private entity * * *.

* * * * *

The relevant portions of the Act of September 2, 1960, 74 Stat. 590, 39 U.S.C. (1958 ed.) Supp. II, secs. 2102 and 2103, provide:

§ 2102. Leases.

(a) Notwithstanding any other provision of law the Postmaster General may lease, on such terms as he deems appropriate, real property necessary in the conduct of the affairs of the Department.

* * * * *

(c) The Postmaster General may rent quarters for postal purposes without entering into a formal written contract where the amount of the rental does not exceed $1,000 per annum.

* * * * *

§ 2103. Additional leasing authority.

(a) In addition to the authority vested in him by section 2102 of this title the Postmaster General may—

(1) negotiate and enter into lease agreements which do not bind the Government for periods exceeding thirty years, on such terms as the Postmaster General deems to be in the best interests of the United States, for the erection by the lessor of the buildings and improvements for postal purposes as the Postmaster General deems appropriate, on lands sold, leased, or otherwise disposed of by the Postmaster General to, or otherwise acquired by, the lessor * * *.

* * * * *

STATEMENT

This action was instituted by the United States in December 1959 to obtain a judgment declarative of the legal rights and duties of the United States arising out of an agreement entitled "Proposal to Lease Quarters" and the Government's use and occupancy of the post office site at Winslow, Washington (now known as the Bainbridge Island Station of Seattle, Washington) (App. 35). Named as defendants were Earl L. Sands and wife; James E. Comrada and wife; Frederick D. Holbrook, trustee in bankruptcy of Mr. Comrada; and the First Federal Savings and Loan Association of Bremerton (hereinafter referred to as "First Federal" or appellant). The facts giving rise to the action may be summarized from the complaint and the "admitted

facts" recited in the district court's Pre-trial Order, and the trial as follows:

Desiring a post office building in Winslow, Washington, The Post Office Department invited bids (R. 64-65). In the "Proposal to Lease Quarters," dated June 25, 1955, as amended December 1, 1955, which was accepted by the Government on February 27, 1956, the Comradas agreed to construct the post office building according to specifications and to lease the property to the United States for a term of 15 years at an annual rental of $1,480.00, with one five-year renewal option at $1,320.00 a year (R. 5; App. 44).

On January 28, 1956, Mr. Comrada contracted with the Sands for the construction of the post office building "in accordance with postal specifications, as per plans furnished" (R. 5-6). Mr. Sands understood that the building to be constructed was for government use (R. 58). On May 23, 1956, the Comradas and the Sands entered into a contract superseding the earlier contract (R. 8, 56). The new contract provided for construction by Mr. Sands "of that certain post office building at Winslow, Washington" and expressly incorporated "the drawings, plans and specifications prepared by the United States Government" (R. 8). By the contract's terms, Mr. Comrada assigned all income from the property to Mr. Sands to be applied to the construction costs; Comrada agreed to give the Sands a statutory warranty deed; and the Sands agreed to reconvey to the Comradas upon payment of the construction costs and interest (R. 9). On that same date, Comrada conveyed the property to the Sands by statutory warranty deed (R. 6).

On July 25, 1956, the Sands obtained a loan of $21,000.00 from First Federal and as security executed a mortgage which covered the post office site and the adjoining parcel, known as the "restaurant property" (R. 6, 56). The amount of the loan represented the balance owing to First Federal on a 1954 loan to the Comradas, which was secured by a mortgage on the adjoining parcel, and $8,000.00 to finance the construction of the post office building (R. 6, 9-10, 103). The loan application recited that the money was to be used for "completing the above-described post office" (R. 10). Mr. Sands informed First Federal's assistant and loan secretary, Emily A. Sprague, that there was no lease of the property (R. 10, 56-57, 93). First Federal's president "knew that the building was being built for occupancy as a United States Post Office, and designated the building as a post office in his appraisal report" (R. 11). He personally made a physical inspection and appraisal of the parcels offered by the Sands as security for the loan, which inspection revealed a restaurant on the adjoining parcel and a "post office, 27 feet by 74 feet, which improvement was appraised at $16,453.00 (when completed)" (R. 10-11). No inquiry regarding a lease or lease agreement was made by First Federal to the Post Office Department or any person other than the Sands (R. 11). An employee of the title insurance company, which insured the mortgage for First Federal, "observed that the building under construction was to be used as a post office" (R. 11). In November 1956, First Federal declined to sign an agreement subordinating its mort-

gage to the Post Office Department's lease agreement (R. 11).

The Government went into possession of the premises on December 1, 1956, though construction had not been completed (R. 7). Construction was completed by the Government through competitive bids at a cost of $910.75 (App. 39-40). In the early part of 1958, Mr. Comrada was declared a bankrupt and Mr. Holbrook was appointed trustee in bankruptcy (App. 41). In November 1958, the Comradas executed a quitclaim deed to the Sands, which provided that rents due from the Government for the period prior to November 20, 1957, should be the property of the Sands (R. 7; App. 40-41).

On September 23, 1959, First Federal commenced a foreclosure action against the Sands, the Comradas, Mr. Holbrook, and the United States, in a state court, which action was removed to the district court on the Government's petition where the United States was dismissed as a party defendant on First Federal's motion (R. 7, 6, 94). A judgment of foreclosure was subsequently entered in that action (R. 6). The Sands then filed an action, Civil No. 4923, on September 30, 1959, in the district court, which was later consolidated for trial with the present case (R. 21). Civil No. 4923 as amended was against the United States, the Sands seeking damages in the amount of $9,999.99 for an alleged unlawful taking of property (R. 21). The Government then filed this declaratory judgment action on December 4, 1959, alleging, *inter alia,* that (1) its expenditures to complete the construction of the building in July 1957 had been necessitated by the refusal

of Mr. Sands and Mr. Comrada to finish the building; (2) both Mr. Sands and Mr. Comrada approved of the Government's procedure and agreed that the completion costs could be set off against rents due; (3) the Sands declined to execute a formal lease with the Government pursuant to the terms and conditions of the proposal to lease; and (4) both the Sands and First Federal had notice of the Government's interest (App. 39-41). The Government simultaneously deposited into the court registry the sum of $3,529.25, alleged to be the rent due (App. 40). On March 25, 1960, First Federal obtained title to the property at a foreclosure sale and demanded a monthly rental of $330.00 (R. 6-7, 94-95).

A three-day trial before the court was concluded on September 15, 1960. The testimony developed the above facts and the following: John L. Van Buskirk, the Regional Real Estate Manager of the Post Office Department, testified that the practice of the Post Office Department is to incorporate the terms and conditions contained in an unacknowledged proposal to lease in an acknowledged lease to be executed and recorded when the building is completed or when possession is assumed (R. 65-66, 69-70, 74). The sample lease on the reverse side of the proposal was said to specify monthly payments of rent (R. 75). Mr. Buskirk also stated that the Post Office Department pays rent many times pursuant to an accepted agreement to lease and that a local postmaster would have copies of documents relating to property under his control and is authorized to disclose the status of such property upon request (R. 80-82). The Post Office Depart-

ment knew of First Federal's mortgage at the time it went into possession (R. 84). Mr. Buskirk related that the annual rental for the Marysville postal facility in the area was $4,200.00 for 3,206 square feet; $6,800.00 for the Redmond facility (6,163 square feet); $3,816.00 for the East Stanwood facility (3,102 square feet); and $1,700.00 for the Darrington facility (1,793 square feet) (R. 143-144). The Winslow facility here involved was approximately 2,000 square feet and the annual rental for the 15-year term, as provided in the proposal to lease, was $1,480.00, with one five-year renewal option at $1,320.00 a year (R. 5, 11). Mr. Buskirk explained that (1) there are 15 postal regions in the nation; (2) there are approximately 2,000 post offices in the fifteenth region, which embraces the States of Washington, Oregon, Idaho, Montana, and Alaska; (3) 1,200 to 1,300 are rented quarters; (4) the normal, authorized procedure was followed in obtaining the Winslow facility; (5) the procedure is used in all 15 of the postal regions; and (6) over 300 facilities were obtained each year from 1953-1955, and approximately 600 each year from 1956-1959 under the "standard agreement to lease procedure" (R. 61-66).

Earl A. Wohlfrom, a postal inspector who retired in June 1957, explained that detailed information concerning the Government's interest in the property would be available to "interested parties" at the Post Office in Seattle, Washington (R. 85-88, 90-92). He did not believe a local postmaster would have complete information and for that reason would refer any inquiry to the postal inspection service (R. 87). Before construction began, Mr. Wohlfrom knew that Mr.

Comrada would need outside financing (R. 89-90). Otto Lippman owned five stores adjoining the post office site (R. 137). The main floor of one of his buildings rented for $275.00 monthly and the upper floor, a five-room apartment, rented for $125.00 monthly, both under a five-year lease (R. 137-138, 141). The rental on another building was the same for the last five years and the lessee had an option to renew for a five-year term (R. 140-141). Lessees of two other buidings had ten-year leases (R. 141).

Witnesses for First Federal were Emily A. Sprague, its assistant and loan secretary, and Arnold H. Burmaster, an appraiser. Mrs. Sprague claimed that First Federal had no knowledge as to whether the Government had an actual lease on the premises, and did not know whether it was subsequent to July 1956 that she learned of another post office in the area for which the Government did not have a lease (R. 96-97, 99, 101-102). A monthly rental of $158.00 was being received on the adjoining restaurant property which was admitted to be of the same quality construction as the post office building (R. 98-99). That monthly rental was said to reflect taxes, fire insurance, 6% interest on the loan, and miscellaneous upkeep and bookkeeping costs, with no return on capital (R. 100, 102). Mr. Burmaster believed a fair monthly rental value of the post office site to be $290.00 (R. 105, 116). He conceded that his appraisal had been made "recently," that he was not very well acquainted with Winslow rental values "until I came over to make this evaluation," and that his estimate was not based on rentals

as of December 1956 (R. 105, 128). This concluded First Federal's testimony.

Samuel J. Clarke (a realtor and builder), Charles L. Seavey (the Winslow postmaster who retired in July 1958), and Mr. Sands appeared as witnesses for the Sands. It was Mr. Clarke's opinion that a reasonable rental value as of December 1, 1956, was $330.00 (R. 129). In answer to a question relating to his having "had no previous experience appraising leasehold valuations," he said, "You might construe it that way" (R. 131). Mr. Seavey said that prior to May 23, 1956, he would not have been able to apprise anyone who asked of the express terms of the proposal to lease, but he would have been able to tell them of the existence of an agreement "to build, purchase and lease," and would have referred them to the postal inspector in Seattle, Washington (R. 132-134). Concluding their testimony, Mr. Sands opined that the reasonable monthly rental value was $333.00 as of December 1956, but he could not testify whether rental values had increased since that time though his view was that rental values had not decreased (R. 135-136).

In its Memorandum Opinion, filed on October 8, 1960, the district court stated that Mr. Holbrook withdrew from the action in consideration of the Sands' assignment of proceeds up to $1,400.00 (R. 21). The district court decided that federal law should govern the case, that the Government was under no legal duty to record the proposal to lease, that the proposal constituted an agreement to execute a lease in the future but was not a lease in itself, and that the Government thereby acquired an equitable right which was superior

to the Sands' and First Federal's rights since they acquired their interests with notice of the Government's equitable right (R. 23-28, 32). The terms of the agreement to lease were held to be sufficiently definite so as to permit specific performance (R. 30). The Government's completion costs were set off against the rents due (R. 33-34). Rents accruing after March 25, 1960, were held to be payable to First Federal or any subsequent owner (R. 34-35). The district court's findings of fact and conclusions of law were substantially in accord with the "admitted facts" of the pretrial order and its memorandum opinion, the district court expressly finding as follows (R. 40-42):

> 20. Earl L. Sands and First Federal Savings and Loan Association had actual notice of the proposal to lease quarters, the agreement between the government and the Comradas, and that therefore they did not have the status of a bona fide purchaser or a bona fide encumbrance. The actual notice consisted of implied or inquiry notice, that is, both Sands and First Federal Savings and Loan Association had knowledge of facts which would excite a prudent man to make further reasonable inquiry, and such an inquiry, if made, would have disclosed the interest which the government had in the subject property. Therefore both Sands and First Federal Savings and Loan Association are charged with having actual knowledge of the existence of the government's and Comrada's agreement to lease and they acquired their respective interests in the property subject to the interest of the United States.

21. Information concerning both the existence of the agreement to lease and the terms of the lease contemplated by the agreement to lease was reasonably available to any properly interested person and could have secured from either the postal inspector or the local postmaster and presumably from James E. Comrada. Had inquiry been made by Sands or First Federal Savings and Loan as to the particulars of any rental or lease arrangement existing with respect to the building, under construction, full information would have been forthcoming.

* * * * *

26. First Federal Savings and Loan did not perform their [sic] duty of making reasonable inquiry when they asked Sands if the government had a lease. Prudent banking practice demands more than accepting without further investigation a prospective borrower's statements as to the facts surrounding his security.

The Government was directed to prepare and to deliver a lease as to the Sands and First Federal pursuant to the proposal to lease, the lease to be executed and acknowledged by the parties or their successors in interest and recorded (R. 44). The Sands' action was dismissed with prejudice (R. 35). Judgment was thereafter entered and this appeal followed (R. 45, 48). Subsequent to the filing of its brief on appeal, First Federal announced the sale of its interest in the property to Joseph P. Mentor, Jr., who was reported to

have retained First Federal's counsel "to carry on on [in?] his behalf, the above-entitled law suit" (Report of Sale dated May 31, 1961, filed in this Court on June 6, 1961) (App. 50).

At the Government's request and pursuant to the report of sale, opposing counsel provided copies of "all papers in evidence of the transaction" (App. 50-56). One of the two papers is entitled "Assignment with Power to Carry On a Lawsuit" (App. 51). It recites that First Federal has "no further interest in and to said lawsuit and the appeal therefrom" and that First Federal (App. 52):

> does hereby sell, assign, transfer, set over and deliver unto the said Joseph P. Mentor, Jr., his executors, administrators and assigns all their right, title and interest in and to the above described lawsuit, and to any recovery that might be made therefrom * * *.

The instrument is acknowledged by First Federal to be its "free and voluntary act and deed" (App. 53). These instruments, together with the Complaint and the proposal to lease, are printed in the Appendix to this brief.

SUMMARY OF ARGUMENT

The appeal should be dismissed because appellant has voluntarily conveyed all its interest in the subject matter of the case, and because the Anti-Assignment Act, *supra,* precludes the prosecution of appellant's alleged claim against the United States by appellant's grantee.

But even on the merits, the district court's disposi-

tion should be upheld. Its rejection of the applicability of state law to the agreement to lease the building to the United States for use as a postal facility is well founded. Its finding and conclusion, that appellant had actual notice of the interest of the United States in the property under the agreement to lease and thereby acquired its interest subject to the interest of the United States, are supported by substantial evidence and should not be set aside on the appeal. Moreover, since the terms of the agreement to lease are sufficiently definite and equitable, the decree of specific performance is warranted.

ARGUMENT

I

The Appeal Should Be Dismissed

A. *First Federal lacks an interest in the subject matter of the appeal.*—It is settled law that a party to a lawsuit who has divested himself of the subject matter of the case may not maintain the appeal. In *Hamilton Trust Co.* v. *Cornucopia,* 223 Fed. 494 (C.A. 9, 1915), cert. den. 239 U.S. 641, this Court emphasized (at 499):

> It is a fundamental rule of appellate jurisdiction that every person desiring to appeal from a decree must be interested in the subject-matter of the litigation, and the interest must be immediate and pecuniary and not a remote consequence of the judgment. The interest must be substantial, and a merely nominal party to an action cannot appeal. The interest must also be subsisting, for although a party may have an appealable interest at the commencement of the suit, if that interest has termi-

> nated before the entry of the judgment or decree sought to be appealed from, he cannot appeal. Again, the right or title which the appellant seeks to establish must be his own and not that of a third person. * * *

The decision was the same in *DeKorwin* v. *First National Bank of Chicago,* 235 F.2d 156, 158-159 (C.A. 7, 1956), where the court relied on an earlier opinion, *In Re Michigan-Ohio Bldg. Corp.,* 117 F.2d 191-192 (C.A. 7, 1941):

> Generally accepted is the legal tenet that no one may appeal from a judgment unless he has an interest therein, direct, immediate, pecuniary and substantial. Speaking more specifically, a party has an appealable interest only when his property may be diminished, his burdens increased or his rights detrimentally affected by the order sought to be reviewed. [Citation omitted.] It follows that if his interest or right in and to the subject matter ceases pendente lite, by conveyance, assignment or otherwise, his appealable interest thereby expires, however prejudicial the judgment may be to another. [Citation omitted.] * * *

See also *Fulton Nat. Bank* v. *Gormley,* 99 F.2d 464, 465 (C.A. 5, 1938); *United Porto Rican Sugar Co.* v. *Saldana,* 80 F.2d 13, 14 (C.A. 1, 1935).

Here, the appellant, First Federal, has reported to the Court that it has conveyed all of its interest in the property which is the subject matter of the suit (App. 50). It admits its lack of interest and the assignment to Mr. Mentor provides that Mr. Mentor "shall in-

demnify and hold harmless First Federal * * * from any further expenditure or liability of any kind whatsoever * * *'' (App. 53). It follows that the appellant no longer has an appealable interest—its property is not diminished, its burdens are not increased, and its rights are not detrimentally affected. Consequently, First Federal's appeal should be dismissed.

B. *The appeal may not be prosecuted by First Federal's grantee.*—Ordinarily, the grantee of a party subject to a trial court judgment may be substituted on the appeal as appellant or appellee and the appellate court may direct substitution in its discretion on its own motion or on the grantee's motion. *McComb* v. *Row River Lumber Co.,* 177 F.2d 129, 130 (C.A. 9, 1949); *Sumpter Lumber Co.* v. *Sound Timber Co.,* 257 Fed. 408, 410 (C.A. 9, 1919); *United States* v. *Seigel,* 168 F.2d 143, 144-147 (C.A. D.C. 1948); *United Porto Rican Sugar Co.* v. *Saldana,* 80 F.2d 13, 14 (C.A. 1, 1935); *International Exchange Bank* v. *Pullo,* 285 Fed. 933, 934-935 (C.A. D.C. 1922); *F.A. Mfg. Co.* v. *Hayden & Clemons,* 273 Fed. 374, 378-379 (C.A. 1, 1921).

In this case, First Federal's grantee has not applied to the Court for substitution and may not prosecute First Federal's appeal because the Anti-Assignment Act, R.S. sec. 3477, as amended, 31 U.S.C. sec. 203, clearly proscribes the assignment of claims against the United States. That the assignment here attempts to transfer a claim against the United States is made manifest by the "Assignment with Power to Carry On a Lawsuit" (App. 51). In the district court, First Federal asserted a claim for an increased rental, and, in support thereof, offered testimony of what it be-

lieved to be a reasonable rental (R. 95, 105, 116). That claim was denied. After judgment and after filing its notice of appeal, First Federal conveyed all its interests in the property to Mr. Mentor and, in doing so, attempted to assign its purported claim to Mr. Mentor (App. 51). At all pertinent times, First Federal had simply a claim against the United States for an increased rental. That claim had not been allowed, the amount due if the claim had been allowed had not been ascertained, and no warrant had been issued. That the assignment involved here was not "made and executed in the presence of at least two attesting witnesses" cannot be denied (App. 53-54). Under the express language of the Anti-Assignment Act, *supra,* this voluntary assignment was therefore "absolutely null and void."

The Supreme Court has consistently held that such voluntary assignments are ineffective as against the United States and cannot be the basis of a judgment against the United States. *United States* v. *Shannon,* 342 U.S. 288, 291-294 (1952); *National Bank of Commerce* v. *Downie,* 218 U.S. 345 (1910); *Hager* v. *Swayne,* 149 U.S. 242 (1893); *Flint and Pere Marquette Railroad Co.* v. *United States,* 112 U.S. 762 (1885); *St. Paul Railroad* v. *United States,* 112 U.S. 733 (1885); *McKnight* v. *United States,* 98 U.S. 179 (1878); *United States* v. *Gillis,* 95 U.S. 407 (1877). Decisions which have established the principle that transfers by operation of law are not within the prohibition of the statute recognize that voluntary assignments are invalid. *United States* v. *Aetna Surety Co.,* 338 U.S. 366, 370-383 (1949); *Western Pacific Co.* v.

United States, 268 U.S. 271, 275-276 (1925); *Price* v. *Forrest,* 173 U.S. 410, 422-423 (1899); see also *Martin* v. *National Surety Co.,* 300 U.S. 588, 594-595 (1937); *Nutt* v. *Knut,* 200 U.S. 12, 19-20 (1906); *Ball* v. *Halsell,* 161 U.S. 72, 78-81 (1896); *Freedman's Saving Co.* v. *Shepherd,* 127 U.S. 494, 505-506 (1888); *Bailey* v. *United States,* 109 U.S. 432, 436-438 (1883); *Spofford* v. *Kirk,* 97 U.S. 484, 488-490 (1878). The only exceptions noted by the Supreme Court with respect to voluntary assignments of claims made to take effect before allowance are general assignments for the benefit of creditors, *Goodman* v. *Niblack,* 102 U.S. 556 (1880), and transfers by will, *Erwin* v. *United States,* 97 U.S. 392 (1878). See *United States* v. *Shannon,* 342 U.S. 288, 292 (1952).

There is no basis in the instant case for application of the exception relating to transfers by operation of law. This attempted voluntary assignment not constituting either of the only exceptions to the statute's proscription, the assignment must fall and the grantee denied prosecution of the appeal. As the Supreme Court declared, with reference to voluntary assignments, in *National Bank of Commerce* v. *Downie,* 218 U.S. 345, 356 (1910):

> They are clean-cut cases of a voluntary transfer of claims against the United States, before their allowance, in direct opposition to the statute. If any regard whatever is to be had to the intention of Congress, as manifested by its words—too clear, we think, to need construction—we must hold such a transfer to be absolutely null and void, and as

> not, in itself, passing to the appellants any interest, present or remote, legal or equitable, in the claims transferred. * * *

In *United States* v. *Gillis,* 95 U.S. 407 (1877), the Supreme Court rejected the argument that the Act applied only to claims asserted before the Treasury Department (in which the fiscal and accounting offices were then located) and not to suits in the Court of Claims, stating (at 413 and 416): "The words embrace every claim against the United States, however arising, of whatever nature it may be, and wherever and whenever presented," and the Act "is of universal application, and covers all claims against the United States in every tribunal in which they may be asserted."

It does not suffice to contend that double recovery against the United States is rendered impossible here and that the grantee should be allowed to pursue the appeal. Avoidance of possible double recovery is not the only purpose of the Act. Indeed, "its primary purpose was undoubtedly to prevent persons of influence from buying up claims against the United States, which might then be improperly urged upon officers of the Government." *United States* v. *Aetna Surety Co.,* 338 U.S. 366, 373 (1949). Other purposes are "to make unnecessary the investigation of alleged assignments, and to enable the Government to deal only with the original claimant," *United States* v. *Aetna Surety Co.,* 338 U.S. 366, 373 (1949); "that the government might not be harassed by multiplying the number of persons with whom it had to deal, and might always know with whom it was dealing until the contract was

completed and a settlement made," *Hobbs* v. *McLean,* 117 U.S. 567, 576 (1886); and "to protect the Government from traffic in claims against it," *Sherwood* v. *United States,* 112 F.2d 587, 592 (C.A. 2, 1940), rev'd on other grounds, 312 U.S. 584. Clearly, the instant case involves traffic in a claim against the United States and the Government is compelled to investigate the assignment. Allowance of the grantee's appeal would impel the United States to deal with one who is not the original claimant and the number of parties with whom the Government must deal would be multiplied.

Denial of the grantee's right to pursue the appeal may appear harsh. But the prohibition of the statute may not be avoided on equitable principles. In *Shannon,* the Supreme Court rejected "hardship" as a ground for subverting the Act and declined a proposal to balance the equities, stating that the proposal was one "which this Court has many times repudiated * * *." 342 U.S. at 294. Earlier, in *Downie,* it approvingly quoted *Spofford:* "It would seem to be impossible to use language more comprehensive than this. It embraces alike legal and equitable assignments." 218 U.S. at 353; 97 U.S. at 488. Moreover, "[a]n equity can not grow out of an illegal and void transaction." *Hitchcock* v. *United States,* 27 C. Cls. 185, 206 (1892), aff'd *sub nom. Prairie State Bank* v. *United States,* 164 U.S. 227 (1896).

It is true that since the statute is for the protection of the Government, it will not be applied so as to produce inequitable results between assignor and assignee. *McKenzie* v. *Irving Trust Co.,* 323 U.S. 365 (1945); *Martin* v. *National Surety Co.,* 300 U.S. 588 (1937);

Lay v. *Lay,* 248 U.S. 24 (1918); *McGowan* v. *Parish,* 237 U.S. 285 (1915). In those cases, however, equitable principles were invoked in determining which party should receive money which the Government had paid or allowed, and the Government was not directly concerned with the result. Here, invocation of equitable principles would allow a suit against the United States by the assignee of an unliquidated claim. The result would be the emasculation of the statute, to the clear detriment of the United States. Further, " [a]ny ordinarily prudent person in purchasing property takes into consideration its condition at the time of the purchase. It is reasonable to assume that plaintiff did so." *Smith* v. *United States,* 96 C. Cls. 326, 342 (1942). In this case, it affirmatively appears that the grantee knew the status of his grantor's title as well as the interest of the United States (App. 41). And the Government had no part whatever in the transaction by which the claim against the United States was assigned. Thus, even if the statute did not preclude the granting of equitable relief, there is, in fact, no basis for such relief here. The conclusion is, we submit, inescapable that contrary to the terms and purposes of the statute, the grantee bought, and seeks to recover upon, his assignor's claim against the United States. Hence, the grantee should not be substituted for his grantor as appellant and the appeal should be dismissed.

II

The District Court Correctly Held Appellant to be Bound By the Agreement to Lease on the Merits of the Case

A. *The application of state law was properly rejected.*—In its memorandum opinion, the district court said (R. 23-24):

> As I announced at the commencement of the trial, Federal law and not Washington law should govern this suit. At this point I will briefly state my reasons for so holding. When the United States Government sets out to establish postal facilities, they are engaged in performing an essential governmental function as specifically empowered by the Constitution. Whenever the Government is engaged in such an activity which by its very nature will be carried on in all cities, towns and communities throughout all States of the Union, it is important that uniformity be achieved. To require that negotiations for securing postal facilities be conducted within the framework of each State's laws, which are admittedly varied and often contradictory, would impose an intolerable burden upon the Government. The respect which the Federal Government normally accords the laws of each individual state must give way in the interest of uniformity when the Government is performing a Constitutional function.

It is submitted that the district court's conclusion is eminently correct. Considerations similar to those relied upon by the district court were held by the Supreme

Court to require the application of a federal rule and the repudiation of state law to a situation involving the Government's contractural relations in *Clearfield Trust Co.* v. *United States,* 318 U.S. 363, 366-367 (1943). The factors deemed to be controlling were repeated by the Supreme Court one year later in *United States* v. *Allegheny County,* 322 U.S. 174, 182-183 (1944), in the statement:

> Every acquisition, holding, or disposition of property by the Federal Government depends upon proper exercise of a constitutional grant of power. In this case no contention is made that the contract with Mesta is not fully authorized by the congressional power to raise and support armies and by adequate congressional authorization to the contracting officers of the War Department. It must be accepted as an act of the Federal Government warranted by the Constitution and regular under statute.
>
> Procurement policies so settled under federal authority may not be defeated or limited by state law. The purpose of the supremacy clause was to avoid the introduction of disparities, confusions and conflicts which would follow if the Government's general authority were subject to local controls. The validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law

> of any State. [Citations omitted.] Federal statutes may declare liens in favor of the Government and establish their priority over subsequent purchasers or lienors irrespective of state recording acts. [Citations omitted.] * * *

And "where essential interests of the Federal Government are concerned, federal law rules unless Congress chooses to make state laws applicable." *United States* v. *93.970 Acres in Cook County,* 360 U.S. 328, 332-333 (1959). Of course the fact that Congress has not acted affirmatively on a specific question does not mean that state law will govern the decision. *United States* v. *Standard Oil Co.,* 332 U.S. 301, 309-311 (1947).

This principle has been recognized by this Court in several cases, including *United States* v. *Christensen,* 269 F.2d 624, 627 (1959), and *United States* v. *Matthews,* 244 F.2d 626, 628 (1957). In another case, after stating "that the *source* of the law governing the relations between the United States and the parties to the mortgage [FHA] is federal," this Court observed "that if the law of the State of Washington is to have any application in the foreclosure proceeding it is not because it applies of its own force, but because either the Congress, the FHA, or the Federal Court adopts the local rule to further federal policy," and that state law would not be selected even where merely permitted by Congress when a uniform federal rule is desirable. *United States* v. *View Crest Garden Apts., Inc.,* 268 F.2d 380, 382 (1959), cert. den. 361 U.S. 884 (emphasis by the Court). See also *American Houses* v. *Schneider,* 211 F.2d 881, 882-883 (C.A. 3, 1954). Even under the

Reclamation Act, where reference is made to state law for some purposes, "[a]s to the rights and duties of the United States under the contracts, these are matters of federal law on which this Court has final word." *Ivanhoe Irrig. Dist.* v. *McCracken,* 357 U.S. 275, 289 (1958).

Pertinent here is the fact that the Constitution provides that Congress shall have power to establish post offices. U.S. Const. Art. I, sec. 8. Pursuant to that power, Congress authorized the Postmaster General to "enter into such leases of real property as may be necessary in the conduct of the affairs of the Department on such terms as he may deem appropriate, without regard to the provisions of any law, except those provisions of law specifically applicable to the Department * * *." Act of August 17, 1950, 64 Stat. 462, 39 U.S.C. sec. 794f, *supra;* see also Act of July 22, 1954, 68 Stat. 523, 39 U.S.C. sec. 903, *supra;* Act of September 2, 1960, Pub. L. 86-682, 74 Stat. 590, 39 U.S.C. (1958 ed.) Supp. II, secs. 2102 and 2103, *supra.* The *source* of the law involved is thus clearly federal. There being agreement here that the Government followed its normal procedure and policy in entering into this proposal to lease and in view of the evidence of the number of postal regions and the use of the procedure and policy throughout the nation, the desirability of a uniform federal rule is patent (R. 61-66). More than half of the 2,000 post offices in the fifteenth region alone are under lease or month-to-month contract arrangement (R. 61-62). When a new facility of the type involved here is needed, the established procedure throughout the nation is the competitive bid

system (R. 64-66). Eight bids were received on the Winslow facility (R. 65). Following construction of the facility or when possession is obtained, a formal lease, in accordance with the terms and conditions of the agreement to lease, is executed (R. 60-70). The federal leasing program would be frustrated if a contractor can construct a building in accordance with an accepted bid and avoid the contract, before or after the federal agency assumes possession and before execution of a formal lease which is then recorded, by invoking a technical local law. Further, if such an accepted bid is a void, unenforceable contract under local law at its inception, the bid would appear to be subject to rejection as nonresponsive in a material respect. Hence, the Government's entire bid-and-award procurement program in the direct performance of an essential federal function would be jeopardized by the varying statutes of the several states.

In urging the adoption of state law here, appellant is contending for the defeat, rather than for the fulfillment, of the federal policy and procedure. That contention must be rejected. Congress has not adopted the local rule and has authorized the Postmaster General to act "without regard to the provisions of any law." Act of August 17, 1950, *supra*. Neither the Post Office Department nor the federal courts has selected state law, for that selection would not further federal policy and would preclude a uniform federal rule. Such a selection would manifestly introduce "disparities, confusions and conflicts," and would "result in substantially diversified treatment where uniformity is indicated as more appropriate, in

view of the nature of the subject matter and the specific issues affecting the Government's interest." *United States* v. *Allegheny County,* 322 U.S. 174, 183 (1944); *United States* v. *Standard Oil Co.,* 332 U.S. 301, 309 (1947). Obviously, "identical transactions [would be] subject to the vagaries of the laws of the several states. The desirability of a uniform rule is plain." *Clearfield Trust Co.* v. *United States,* 318 U.S. 363, 367 (1943). It follows that the district court properly rejected the peculiar state rule[1] and correctly concluded that the agreement to lease created an equitable right in the United States which could be specifically enforced against a subsequent purchaser or encumbrancer who acquires an interest with notice of that equitable interest.

B. *The district court's finding that First Federal was not a bona fide purchaser or encumbrancer is supported by substantial evidence.*—A purchaser is bound to use reasonable diligence and must make due inquiry. Failure to do so will deny him the protection afforded a bona fide purchaser. He is bound by actual as well as constructive notice. "He has no right to shut his eyes or his ears to the inlet of information, and then say he is a *bona fide* purchaser without notice." *Sim-*

[1] Some Washington State cases hold that an unacknowledged contract to execute a lease creates only a tenancy from month-to-month or from period-to-period when the rental is payable, and require a complete legal description of the property before specific performance will be ordered (R. 31; Br. 9). As will be discussed, this agreement was sufficiently definite to permit specific performance. Also, it is not certain that even under the state rule a periodic tenancy would result where, as here, an unacknowledged contract to lease is coupled with a contract to construct a building upon the premises.

mons Creek Coal Co. v. *Doran,* 142 U.S. 417, 437 (1892). It is realized that whether a purchaser has actual notice or knowledge is a question to be determined in each case "by its own peculiar circumstances," as discussed in the *Doran* case where the purchaser was held to have had "actual knowledge, or actual notice of such facts and circumstances, as by the exercise of due diligence would have led it to knowledge of complainant's rights, and that if this were not so, then its ignorance was the result of such gross and culpable negligence that it would be equally bound." 142 U.S. at 439-440. And the facts must, of course, be such as would ordinarily excite inquiry to the particular fact to be elicited. *United States* v. *Shelby Iron Co.,* 273 U.S. 571, 581 (1927). The general rule as to actual notice was phrased by the Supreme Court as follows (*The Lulu,* 10 Wall. 192, 202 (1869)):

> [K]nowledge of such facts and circumstances as are sufficient to put a party upon inquiry, and to show that if he had exercised due diligence he would have ascertained the truth of the case, is equivalent to actual notice of the matter in respect to which the inquiry ought to have been made.

See also *The Tompkins,* 13 F.2d 552, 554 (C.A. 2, 1926).

In this case, the district court found that First Federal had actual notice of the agreement to lease and consequently was not entitled to the status of a bona fide purchaser or encumbrancer (R. 40). That finding was supported by substantial evidence. The

Sands' loan application to First Federal recited that the money was to be used for "completing the above-described post office" (R. 10). First Federal's president "knew that the building was being built for occupancy as a United States Post Office, and designated the building as a post office in his appraisal report" (R. 11). His inspection of the premises disclosed a "post office, 27 feet by 74 feet, which improvement was appraised at $16,453.00 (when completed)" (R. 10-11). First Federal made no inquiry regarding a lease or lease agreement to the Post Office Department or any person other than the Sands (R. 11). An employee of the title insurance company, which insured the mortgage for First Federal, "observed that the building under construction was to be used as a post office" (R. 11). Inquiry to the postal inspector or the then local postmaster would have revealed the Government's interest and the detailed terms of the agreement to lease (R. 81-82, 85-88, 90-92).

It is submitted that First Federal could not shut its eyes and ears to the inlet of information then available to it and subsequently claim the status of a bona fide encumbrancer or purchaser. Under the facts, the exercise of due diligence would have led it to full knowledge of the Government's interest and its failure to obtain such knowledge was the result of its own negligence. Appellant's contention to the contrary is simply an attempt to have this Court reweigh the evidence and presents nothing for appellate review (Br. 18). The federal appellate courts do not retry facts and will not set aside findings supported by substantial evidence, which here consisted of "admitted

facts" and testimony at the trial. It is "the immemorial canon that, given substantial evidence to support its judgment, the trial court must have its way." *Coleman Co.* v. *Holly Mfg. Co.,* 269 F.2d 660, 661, 665 (C.A. 9, 1959). See also *Ellison* v. *Frank,* 245 F.2d 837, 839 (C.A. 9, 1957); *Lowe* v. *McDonald* 221 F.2d 228, 230 (C.A. 9, 1955); *Hycon Mfg. Co.* v. *H. Koch & Sons,* 219 F.2d 353, 355 (C.A. 9, 1955), cert. den. 349 U.S. 953; *Wittmayer* v. *United States,* 118 F.2d 808, 809-811 (C.A. 9, 1941).

C. *Specific performance of the agreement to lease is warranted.*—The district court's finding that the terms of the agreement to lease are sufficiently definite so as to permit specific performance is unquestioned by appellant (R. 41). In this phase of the case, appellant's entire argument is that the circumstances are such that a court of equity should not grant specific performance (Br. 22-27). The gravamen of that argument is that this Court should retry the facts and reweigh the evidence. As discussed above, that is not the function of the federal appellate courts. The granting of specific performance rests in the sound discretion of the district court and is determined by the particular circumstances of each case. *Nygard* v. *Dickinson,* 97 F.2d 53, 58 (C.A. 9, 1938); *Engelstad* v. *Dufresne,* 116 Fed. 582, 589-590 (C.A. 9, 1902).

Even so, a review of the facts will demonstrate the propriety of decreeing specific performance. Appellant concedes the absence of fraud (Br. 23). Its assertions on the appeal that the Government "knew that they were securing a rental * * * which is not enough to even pay the interest on the loan, pay the taxes,

insurance and upkeep, and does not even commence to amortize the loan''; and that the Post Office Department ''talked'' Mr. Comrada, now claimed to be ''ignorant of business'' and ''a poor business man,'' into the agreement to lease, as amended, are without foundation in the record (Br. 23). Nor does appellant cite any evidence of ''overkeenness'' in this case (Br. 25).

The question as to the reasonableness of the terms of the agreement was factual and the evidence conflicting. The trier of fact was not compelled as a matter of law to accept appellant's testimony of market rental value. Indeed, little weight could have been assigned to that testimony, since the appraisal on which the estimate was based had been made ''recently,'' appellant's appraiser, Mr. Burmaster, was not very well acquainted with local rental values ''until I came over to make this evaluation,'' and his estimate was not based on rentals as of the time the agreement was negotiated or even when the Government assumed possession in 1956 (R. 105, 128). Also, the terms of the agreement to lease constituted evidence to be considered on the question of reasonable market value. The Government itself proffered testimony relating to rentals of other postal facilities and other Winslow rentals (R. 137-141, 143-144). The fact that a long-term lease was involved was additional evidence to be considered. The Government's assumption of possession with knowledge of appellant's mortgage and refusal to subrogate the mortgage to the Government's interest formally is, we submit, irrelevant to the question (Br. 22-24). Furthermore, if the terms of the agreement to lease are unconscionable, as appellant

claims, it is curious that it would be successful in conveying its interest in the property to Mr. Mentor, the lessor of another postal facility, knowing that the district court had directed specific performance of the agreement (R. 114-115). Mr. Mentor is nowhere alleged to be "a poor business man" or "ignorant of business."

The terms of the agreement to lease are sufficiently definite and appellant had actual notice of the Government's interest. There is no question of fraud and the district court's findings are amply supported by evidence. The decree of specific performance is therefore proper.

CONCLUSION

For the foregoing reasons, it is submitted that the appeal should be dismissed. If the appeal is not dismissed, the judgment should be affirmed.

Respectfully,

RAMSEY CLARK,
Assistant Attorney General.

CHARLES P. MORIARTY,
United States Attorney,
Seattle 4, Washington.

JAMES F. MCATEER,
Assistant United States Attorney,
Seattle 4, Washington.

ROGER P. MARQUIS;
RAYMOND N. ZAGONE,
Attorneys,
Department of Justice.
Washington 25, D. C.

AUGUST, 1961.

APPENDIX

UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

No. 4959

UNITED STATES OF AMERICA, PLAINTIFF,

v.

EARL L. SANDS, a/k/a E. L. SANDS, and RITA SANDS, his wife; JAMES E. COMRADA and FLORENCE COMRADA, his wife; FREDERICK D. HOLBROOK, Trustee in Bankruptcy of James E. Comrada, and FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF BREMERTON, DEFENDANTS.

COMPLAINT

COMES NOW the United States of America by and through Charles P. Moriarty, United States Attorney for the Western District of Washington, and James F. McAteer, Assistant United States Attorney for said District acting under the direction of the Attorney General of the United States and at the request of the Postmaster General, and for cause of action against the defendants, alleges as follows:

I

This is a suit of a civil nature brought by the United States of America, and jurisdiction therefor rests on 28 U.S.C.A. 1345. An actual controversy exists between plaintiff and the parties defendant and each of them, and plaintiff seeks a declaration of rights and other legal relations pursuant to 28 U.S.C.A. 2201.

II

The Postmaster General, hereinafter mentioned, is an agent of the plaintiff, United States of America, a

corporation sovereign and at all times and in all matters hereinafter mentioned, said Postmaster General, his officers and agents acted for and on behalf of the plaintiff, which was and is the real party in interest under and by virtue of Article 1, § 8 of theFederal Constitution and 39 U.S.C.A. 794f.

III

The defendants Earl L. Sands, a/k/a E. L. Sands, and his wife, Rita Sands, are and were at all times material to this complaint husband and wife and comprise a marital community under the laws of the State of Washington; that said defendant and his wife reside at Winslow, Washington in the Northern Division of the Western District of Washington.

IV

The defendants James E. Comrada and his wife, Florence Comrada, are and were at all times material to this complaint husband and wife and comprise a marital community under the laws of the State of Washington; that said defendant and his wife reside at Winslow, Washington in the Northern Division of the Western District of Washington.

V

That the defendant Frederick P. Holbrook is the duly appointed and acting Trustee in Bankruptcy for the Estate of James E. Comrada, bankrupt. Said Frederick P. Holbrook resides at Bellevue, Washington and maintains offices at Seattle, Washington in the Northern Division of the Western District of Washington.

VI

The defendant First Federal Savings and Loan Association of Bremerton is a federal savings and loan as-

sociation organized under the laws of the United States and doing business in the State of Washington, having its principal place of business in Bremerton, Washington in the Northern Division of the Western District of Washington.

VII

The defendants James E. Comrada and Florence Comrada, his wife, in a proposal to lease quarters, dated June 25, 1955, as amended December 1, 1955, and accepted by the Postmaster General on February 27, 1956, agreed to construct a post office building at Winslow, Washington (now known as Bainbridge Island Station of Seattle, Washington) according to certain specifications and to lease the property to the United States for a term of fifteen (15) years at an annual rental of $1,480.00 with one 5-year renewal option at $1,320.00 a year. A copy of said proposal to lease quarters, as amended and accepted, is attached hereto, marked Exhibit A, and by this reference made a part hereof as though fully set forth.

VIII

On January 28, 1956 a contract was entered into between the defendant James E. Comrada and the defendant Earl L. Sands, d/b/a Sands Construction Company, wherein the defendant Earl L. Sands agreed to construct the post office building at Winslow, Washington in accordance with the specifications contained in the proposal to lease quarters dated June 25, 1955 and accepted by the Postmaster General for a total price of $17,050.00. Thereupon the said defendant Sands commenced construction of said post office with his own funds, investing approximately $6,000.00 of his own funds on the construction. Thereafter it became known that the defendant Comrada was unable

to negotiate a loan to finance the construction of said post office.

IX

On May 23, 1956 the defendants James E. Comrada and Florence Comrada, his wife, conveyed by statutory warranty deed to the defendant E. L. Sands the real estate on which the aforementioned post office building was under construction. Said real estate is more particularly described as follows:

> That part of the Northwest quarter of the Southwest quarter, Section 26, Township 25, North, Range 2 E.W.M. described as follows:
> Beginning at the Southwest corner of the North one-half of the Southwest one-quarter of said Section 26; thence North 20 feet; thence East 718 and one-half feet to the point of beginning (sic) of the tract; thence West 29 feet to the point of beginning; and an EASEMENT appurtenant over the following described property which adjoins the above described property, being more accurately described as follows: Beginning at the Southwest corner of the Southwest corner of the North one-half of the Southwest one-quarter of said Section 26, thence North 20 feet, thence East 747 and one-half feet to the point of beginning; thence North 200 feet; thence 11 and one-half feet East; thence South 200 feet; thence West 11 and one-half feet to the point of beginning; situate in the County of Kitsap, State of Washington (hereinafter referred to as the post office site).

X

On July 25, 1956 the defendants E. L. Sands and Rita D. Sands, his wife, executed a mortgage on the post office site and another parcel of land to the defendant

First Federal Savings and Loan Association of Bremerton to secure a note of even date in the amount of $21,000.00. The purpose of said mortgage and note was to finance the construction of the building on the post office site. The defendant First Federal Savings and Loan Association of Bremerton had notice of the agreement to lease the building to be built on the post office site (Exhibit A, herein) at the time of the execution of said mortgage and took said mortgage subject to said agreement to lease.

XI

On December 1, 1956 the Post Office Department began occupancy of the building, notwithstanding the fact that the building was not fully completed. Said occupancy was with the express permission of the defendant Earl L. Sands which was communicated by letter dated October 30, 1956, a copy of which letter is attached hereto, marked Exhibit B and by this reference made a part hereof as though fully set forth.

XII

The defendant Sands was repeatedly asked to complete construction of the post office building, but such completion was not undertaken. Thereafter the Post Office Department advised both the defendant Earl L. Sands and the defendant James E. Comrada that the only alternative to completion of construction was to put the unfinished work out for public competitive bids and set off the cost thereof against the rentals due. This was done with complete approval of said defendants Sands and Comrada in July of 1957, at a cost of $716.55 (a copy of the accepted bid is attached to proposal to lease quarters, Exhibit A herein). In addition, miscellaneous other repairs to said premises were made and paid for by the Post Office Department in the

amount of $194.20, for a total cost to the Post Office Department of $910.75.

XIII

The plaintiff has occupied the post office premises at Winslow, Washington at all times since December 1, 1956. Under the terms of the proposal to lease quarters, as amended and accepted (Exhibit A herein), there is due and owing from the plaintiff as of December 1, 1959 for rent during such 3-year period the sum of $4,440.00 less the aforementioned cost of completion of construction and repairs in the amount of $910.75, making the amount of $3,529.25 due.

Pursuant to Rule 67, Federal Rules of Civil Procedure, and 28 U.S.C.A. 2041, plaintiff herewith deposits into the registry of the court said sum of $3,529.25.

XIV

The Post Office Department was advised that in the spring of 1957 the defendant Comrada unsuccessfully brought an action against the defendant Sands in the Superior Court of the State of Washington for Kitsap County (Cause No. 36332) for a reconveyance of title to the post office site and other property. In November, 1958 the defendants James E. Comrada and Florence Comrada executed a quit claim deed to E. L. Sands and Rita D. Sands covering the said post office site, which quit claim deed contains the following provision:

> "It Being Further Agreed between the parties hereto that whereas the United States Postal Department has occupied the building on the above-described property since December 1, 1956, that all rents due by said United States Postal Department for the period from December 1, 1956 to November 20, 1957, less the cost to them of finishing

the improvements thereon shall be the property of the grantors herein, and that all other rents due and owing shall be the property of the grantees herein."

A copy of said quit claim deed is attached hereto, marked Exhibit C, and by this reference made a part hereof as though fully set forth.

XV

In the early part of 1958 the defendant James E. Comrada was declared bankrupt. The defendant Frederick P. Holbrook, Trustee in Bankruptcy, asserts a claim against a portion of the rentals due from the plaintiff.

XVI

On or about September 23, 1959 the defendant First Federal Savings and Loan Association of Bremerton commenced an action seeking to foreclose the mortgage covering the post office site and another parcel of land. Said action on petition of the United States of America was removed and is now pending as Civil No. 4929, Western District of Washington, Northern Division.

XVII

The defendant Earl L. Sands has refused to execute a formal lease with the plaintiff according to the terms and conditions of the proposal to lease quarters, as amended, executed by the defendant James E. Comrada and his wife, Florence Comrada, and accepted by the Government. The defendant Sands has repeatedly refused to accept the back rentals in the amount specified in the agreement between the plaintiff and the defendant Comrada. The defendant Sands has had actual notice since January 28, 1956 and at all times herein, of the terms and condition of said agreement.

XVIII

Defendant Earl L. Sands claims that he is not bound by the plaintiff's contract with the Comradas and that he did not take title to the post office site in 1956 subject to the contract to lease. Defendant Sands and his wife, filed an action in this District on September 30, 1959 against the United States of America, the Postmaster General and the local Postmaster to regain possession of the post office site herein and to recover damages of more than $211,390.00 for alleged unlawful entry and wrongful detainer of possession. (Civil No. 4923, Western District of Washington.)

WHEREFORE, plaintiff prays for judgment and declaration

1. That Earl L. Sands had actual notice of and is bound by the terms and conditions of the proposal to lease quarters, as amended;

2. That the plaintiff's agreement with the Camradas constitutes a valid and enforceable lease of the premises under state and federal law;

3. That the First Federal Savings and Loan Association of Bremerton had notice of the agreement to lease, and took its mortgage from Sands subject thereto. If and when a foreclosure sale is had in the pending foreclosure proceeding (Civil No. 4929) the mortgagee or other purchaser at the foreclosure sale is entitled to receive from the plaintiff only the rental specified in the amended proposal to lease quarters. In the event that there is no foreclosure sale or that the Sands redeem the property, they are entitled to receive only such rental payments. (R.C.W. 6.24.210)

4. That the rental covering the 3-year period, December 1, 1956 to November 30, 1959, less the costs of improvements completed by the Government and repairs, deposited into the registry of the court should

be apportioned between Comrada's Trustee in Bankruptcy and Sands, according to the agreement in the quit claim deed (Exhibit C).

5. That Sands be required to enter into a formal lease with the United States substantial in accord with the terms and conditions of the proposal to lease quarters as amended.

6. And for such further relief, both legal and equitable, as to the court may seem proper.

CHARLES P. MORIARTY,
United States Attorney.

JAMES F. MCATEER,
Assistant United States Attorney.

Proposal to Lease Quarters

The Postmaster General June 25, 1955.
Washington 25, D. C.

The undersigned hereby agrees to lease the premises described below for a term of Ten (10) years from October 21, 1955, or date thereafter of completion of building or any contemplated improvements, additions, etc., but not later than 90 days after acceptance of this proposal by the Post Office Department, for the use of the post office at Winslow, Washington at a rental of Fifteen Hundred dollars (1,500.00) per annum, payable monthly and subject to the provisions of form 1400-a which is attached hereto, and which has been carefully read by the undersigned, except that —. First floor 26 feet 4 inches by 88 feet 8 inches, providing 2,335 sq. ft. net; Basement or cellar — feet — inches by — feet — inches, providing — sq. ft. net; of the one story Cement block building known as — No. — Winslow Way; lot No. None, block No. None, on the North side of Winslow Way —, between Erickson Street and Madison Road; on the — corner of — Street and — Street, in, Winslow, Kitsap County, Washington.

Dimensions and location of any additional spaces or adjoining ground areas which proponent agrees to provide:

An asphalt-paved driveway 14′ wide on east side of building from Winslow Way, extending to an asphalt-paved area at rear of building, 41′ wide by 50′ deep, adjacent to a concrete loading apron 10′ deep by 27′ wide at rear of building, for vehicle access, maneuvering and parking.

I further agree, in consideration of the rental hereinbefore specified:

(a) ~~To furnish satisfactory fuel, heat, light, water, power and sewerage service;~~

(b) ~~To furnish the boxes, fixtures, furniture and safe as listed on Form 1425;~~

(Show whether new, second-hand, equipment as now installed or other appropriate wording.)

(c) To furnish the specified toilet facilities, plumbing, heating, and lighting fixtures on ~~Form 1425-A:~~ per attached addendum.

(d) To provide the necessary gas, electric, and water meters;

(e) To equip the premises in accordance with the building requirements as listed on Form ~~1425-A:~~ per attached addendum.

(f) To furnish —

(g) To furnish —

and to keep the premises, and all items listed above in paragraphs (b) to (g), inclusive in good repair and proper condition, to the satisfaction of the Post Office Department during its occupancy of the premises.

I will have the room or rooms ready for occupancy by the post office on the date specified above as the beginning of the proposed term of lease, provided notice of the acceptance of this proposal by the Post Office Department is promptly received.

SEE ATTACHED ADDENDUM

(SEAL.)

/s/ JAMES E. COMRADA,
(Signature of proponent in full)

/s/ FLORENCE E. COMRADA,
(Signature of wife or husband, if married; of officer; or member of firm)

——— ———,
(Signature of officer, or member of firm)

P. O. Box 144, Winslow, Washington.
(Address of proponent)

Proposal No. 4

(To be filled in by Inspector)

Note.—Wife or husband must join proponent, if married, in submitting proposal. If proponent is a municipality, fraternal order, bank, or other corporation, proposal must be signed by the officers authorized by law or by the by-laws of the organization to sign such instruments and must bear the impression of the proponent's seal.

The contractor, in performing the work required by this contract, shall not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The contractor shall include in all subcontracts a provision imposing a like obligation on subcontractors.

Acceptance by the Government.

Accepted subject to your letter dated December 1, 1955, reducing rental from $1500 per annum to $1480 per annum and increasing the lease term from 10 years to 15 years with one 5-year renewal option at $1320 per annum. All other terms and conditions to remain the same.

(Signed) Rollin D. Barnard,
Acting Assistant Postmaster General.

AUG. 16, 1955.

PAGE 2, FORM 1400 (or 4581)

ADDENDUM

1. Cancellation clauses (a) and (b), paragraph 10, of the standard form of lease used by the Post Office Department shall be eliminated from this contract.

2. This contract may, at the option of the Government, be renewed in periods of 3 years each for not exceeding 10 years additional, the rental for the first option to be $1,480 per annum and for the second option period $1,320 per annum with all other provisions of the formal lease remaining the same.

"In connection with the performance of work under this contract, the contractor agrees not to discriminate against any employee or applicant for employment because of race, religion, color, or national origin. The aforesaid provision shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post hereafter in conspicuous places, available for employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of the non-discrimination clause."

"The contractor further agrees to insert the foregoing provision in all subcontracts hereunder, except subcontracts for standard commercial supplies or raw materials."

(SEAL.) /s/ JAMES E. COMRADA,
(*Signature of proponent in full*).

/s/ FLORENCE E. COMRADA,
(*Signature of wife or husband, if married; of officer; or member of firm*).

——— ———,
(*Signature of officer, or member of firm*).

Dec. 1, 1955.

The Postmaster General,
Washington 25, D. C.

Reference is made to the proposal submitted by me on June 25 and accepted by the Government August 16, 1955, to lease quarters for the post office at Winslow, Washington, for a term of 10 years from date of completion of the building, at a rental of $1,500 per annum, no additional items included, with the Government having the option to renew in periods of 5 years each for not to exceed 10 years additional.

The provisions of that proposal are hereby amended to provide for a lease term of 15 years at a rental of $1,480 per annum, no additional items included, with the Government having the option to renew for one 5-year period at a rental of $1,320 per annum.

It is agreed that should additional floor and driveway space be required at the end of the first 10-year period of this contract, that I will provide same in the amounts determined to be needed by the Department at an annual rate of rental of $0.6338 per square foot for such additional floor space for the remaining 5 years of the base lease, with the rental on the option period to then be increased at the annual rate of $0.5655 per square foot for the additional space provided. In the event the building is enlarged the driveway area at the rear will be extended by a depth of not to exceed 50′.

It is further agreed and understood that all other provisions of my formal proposal are to remain the same.

/s/ James E. Comrada,
Signature of proponent.

/s/ Florence E. Comrada,
Signature of wife.

ACCEPTANCE BY THE GOVERNMENT.

——— ———,
Assistant Postmaster General.

ORMONDE A. KIEB,
By (Signed) Irving W. Thomas,
Director of Real Estate.

FEB. 27, 1956.

Your proposal dated June 25, 1955 and acepted by the Government August 16, 1955, is hereby modified subject to your letter dated Dec. 1, 1955, reducing the rental from $1500 per annum to $1480 per annum and increasing the lease term from 10 years to 15 years with one 5-year renewal option at $1320 per annum. All other terms and conditions to remain the same.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 17303

UNITED STATES OF AMERICA, APPELLEE,

vs.

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF BREMERTON, APPELLANT

REPORT OF SALE

COMES NOW, MARION GARLAND, attorney for the Appellant, First Federal Savings and Loan Association of Bremerton, in the above entitled action, and hereby reports to the Appellee, United States of America and to the above entitled court, that the Appellant has sold all its right, title and interest in and to the property, the subject matter of the above entitled law suit, to JOSEPH P. MENTOR, JR.,

That this atttorney has been retained by Joseph P. Mentor, to carry on on his behalf, the above entitled law suit.

That a copy of all papers in evidence of the transaction are in the office of this attorney and will be furnished to any interested party upon request.

DATED this 31st day of May, 1961.

/s/ MARION GARLAND,
Attorney for Appellant.

Copy mailed this day to James McAteer, Assistant Attorney General this 31st day of May, 1961.

ASSIGNMENT WITH POWER TO CARRY ON A LAWSUIT

WHEREAS First Federal Savings and Loan Association of Bremerton has agreed to sell unto Joseph P. Mentor, Jr., their Certificate of Sale on Real Estate to the following described real property, to-wit:

PARCEL 1. That portion of the Northwest Quarter of the southwest quarter of Section 26, Township 25 North, Range 2 East, W.M., described as follows:

Beginning at a point 673 feet and 3 inches east and 20 feet north of the southwest corner of said northwest quarter of the southwest quarter; thence east 45 feet 3 inches; thence north 150 feet; thence west 45 feet 3 inches; thence south 150 feet to the point of beginning; EXCEPT the south 8 feet conveyed to Town of Winslow by deed bearing auditor's file No. 672154; ALSO

PARCEL 2. That portion of the northwest quarter of the southwest quarter of Section 26, Township 25 North, Range 2 East, W.M., described as follows:

Beginning at the southwest corner of the north half of the southwest quarter of said Section 26; thence north 20 feet; thence east 718.5 feet to the true point of beginning; thence north 200 feet; thence east 29 feet; thence south 200 feet; thence west 29 feet to the point of beginning, TOGETHER WITH an easement to use for road or to build a road for right-of-way purposes and as a means of travel by foot or vehicle over and across the following described strip of land; all as more fully set out in deed bearing auditor's file No. 642238, records of Kitsap County, Washington

Beginning at the southeast corner of the above described tract; thence north 200 feet; thence east 11.5 feet; thence south 200 feet; thence west 11.5 feet to the point of beginning, EXCEPT the south 8 feet from all of Parcel "2" as conveyed to the Town of Winslow

by deed bearing auditor's file No. 672154. Situate in Kitsap County, Washington.

Said Certificate of Sale of Real Estate being that Certificate issued by the sheriff of Kitsap County in Cause No. 39153 in the Superior Court of the State of Washington for Kitsap County, and

WHEREAS there is pending at the present time a lawsuit entitled United States vs First Federal Savings and Loan Association of Bremerton, Cause No. 4959 in the District Court, Western District of Washington, Northern Division, and

WHEREAS said lawsuit has been appealed to the United States Court of Appeals for the Ninth Circuit, and

WHEREAS the First Federal Savings and Loan Association of Bremerton have no further interest in and to said lawsuit and appeal therefrom, and

WHEREAS it is the intent of the purchaser, Joseph P. Mentor, Jr., to carry on said lawsuit, now, therefore, consideration of Joseph P. Mentor, Jr., having purchased the full amount of the investment of First Federal Savings and Loan Association of Bremerton by Certificate of Sale of Real Estate above described, First Federal Savings and Loan Association of Bremerton does hereby sell, assign, transfer, set over and deliver unto the said Joseph P. Mentor, Jr., his executors, administrators and assigns all their right, title and interest in and to the above described lawsuit, and to any recovery that might be made therefrom, and do hereby constitute the said Joseph P. Mentor, Jr. as their attorney in their name, or otherwise, but entirely at his own costs, to take all legal measures which may be proper or necessary for the complete recovery and enjoyment of said assigned premises.

Said Joseph P. Mentor, Jr., in accepting said as-

signment, shall be entitled to all refund of bonds, recovery of costs, judgment, accrued rents, but shall be liable for all additional costs not already incurred, or any judgment that might go adverse to the interest of First Federal Savings and Loan Association or himself, and shall indemnify and hold harmless First Federal Savings and Loan Association of Bremerton from any further expenditure or liability of any kind whatsoever, and by accepting this assignment, does agree to these terms. He further agrees that in the event there is any excise tax payable because of the above described transactions, that he shall be liable therefor.

Dated this 5th day of April, 1961.

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF BREMERTON.
by: P. E. ROSENBARGER,
President.
E. A. SPRAGUE,
Assistant Secretary.

STATE OF WASHINGTON,
County of Kitsap, ss:

On this 5th day of April, 1961, before me personally appeared P. E. ROSENBARGER and E. A. SPRAGUE, to me known to be the President and Assistant Secretary of First Federal Savings and Loan Association of Bremerton, the corporation that executed the within and foregoing instrument, and acknowledged said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned and on oath stated that they were authorized to execute said instrument, and that the seal affixed is the corporate seal of said corporation.

In Witness Whereof I have hereunto set my hand and affixed my official seal the day and year first above written.

~~Marion Garland, Jr.~~
Doris E. Johnson.

Notary Public in and for the State of Washington residing at Bremerton.

RESOLUTION

Be and it hereby is

RESOLVED, that WHEREAS this Association has decided to sell its rights in and to the property known as the post office of E. L. Sands, Loan #11719, and

WHEREAS in order to effectuate said sale it is necessary that an assignment of the Certificate of Sale of Real Estate be exceuted, and that an assignment of the present lawsuit pending in Federal Court entitled United States vs. First Federal Savings & Loan Association of Bremerton, and E. L. Sands; Federal Cause No. 4959, which case has been appealed to the Circuit Court of Appeals under Cause No. 4959, and

WHEREAS all assignments are to be made without recourse for the exact amount of monies invested therein by First Federal Savings & Loan Association of Bremerton, be and it hereby is

RESOLVED that P. E. Rosenbarger, President and E. A. Sprague Assistant Secretary, be and they hereby are authorized to sign any and all instruments necessary to effectuate the sale and assignment of the above described certificate and chose in action.

Dated this 5th day of April, 1961.

CERTIFICATE

Comes now DELOSS SEELEY and hereby certifies that he is the Secretary of First Federal Savings & Loan Association of Bremerton, and that the above Resolution is a true and correct copy of a Resolution passed by the Board of Directors on the 21st day of March, 1961, wherein a quorum was present and all present

voted in favor of said Resolution, and that there has been no further Resolutions or actions by the corporation modifying or in any way nullifying said action.

/s/ DELOSS SEELEY.

☆ U S GOVERNMENT PRINTING OFFICE: 1961 605633 222

No. 17303

United States Court of Appeals

For the Ninth Circuit

FIRST FEDERAL SAVINGS & LOAN ASSOCIATION, OF BREMERTON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION,
BEFORE THE
HONORABLE JUDGE WILLIAM J. LINDBERG

APPELLANT'S REPLY BRIEF

MARION GARLAND, JR.
Counsel for Appellant.

Office and Post Office Address:
206 Dietz Building,
Bremerton, Washington

DICKSON-FLETCHER BREMERTON, WASH.

No. 17303

United States Court of Appeals

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FIRST FEDERAL SAVINGS & LOAN ASSOCIATION, OF BREMERTON,

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MARION GARLAND, JR.
Counsel for Appellant.

Office and Post Office Address:
206 Dietz Building,
Bremerton, Washington

DICKSON-FLETCHER BREMERTON, WASH.

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION,
BEFORE THE
HONORABLE JUDGE WILLIAM J. LINDBERG

APPELLANT'S REPLY BRIEF

RE-STATEMENT OF FACTS

On Page 8 of Appellee's printed Answer, the Appellee sets forth the United States was dismissed as defendant in the hearing in the District Court, Cause No. 4929 on the motion of First Federal Savings

& Loan Association of Bremerton. This is in error. First Federal started its original action in the Superior Court of the State of Washington for Kitsap County. The action was removed to the District Court, Seattle, Washington on motion of the United States Government as provided by 28 USC 2410 and 28 USC 1441 to 1444. The United States at that time as defendant asked the court to dismiss the United States from the action. The U.S. was dismissed on ground it had never allowed itself to be sued. Under 28 USC 2410 a lease was not a mortgage or other lien by which the United States had allowed itself to be sued.

The contention of the Government was refuted by appellant, nevertheless the motion was granted and the case was remanded back to the State Court without the United States as a party. The action was processed in the State Court and resulted in appellant becoming the owner of the property on which the post office is located. The United States Post Office Department then initiated the action at bar, and named appellant as a party defendant. The United States has since the commencement of this action, taken the position that appellant cannot assert a claim against

the United States Post Office, but must receive its rent money through the court of claims. Appellant contested this, but does not appeal from this part of the judgment and this question is set before this Court of Appeals.

Appellant at this time does not make a claim against the United States. This action is entirely the United States claiming that they have a lease and this being denied by the Appellant.

Except as herein explained, it is believed the Statement of Facts as set forth in the Appellant's Opening Brief, and in the Appellee's Answering Brief, are correct.

ARGUMENT IN ANSWER TO THE APPELLEE'S MOTION TO DISMISS

The Appellant sold the building in which the post office of the Appellee is located. When the post office building was sold it was the new owner's responsibility to determine the post office rights under the purported lease. There was therefore an assignment of the action at bar.

The Appellee claims this assignment is in violation of 31 USCA 203, the pertinent parts of which are as follows:

> "All transfers and assignments made of any claim upon the United States * * * except as hereinafter provided, shall be absolutely null and void, * * *. The provisions of this section shall not apply to payments for rent of post office quarters made by post masters, to duly authorized agents of the lessors."

There are three arguments in answer to the appellee:

First: The Appellant has not in this case, made any claim upon the United States. They merely are defending themselves. The United States are claiming the right to possession under an instrument claimed to be a lease.

Second: There has been a sale of the subject matter of the lawsuit, and therefore the real party at interest has become Joseph P. Mentor, Jr., and the law requires the real party in interest prosecute the action. It was not the intent of 31 USC 203 to prohibit the sale of real property.

Lastly: The Statute itself exempts "payments for rent of post office quarters."

Enlarging upon these three arguments:

First: This assignment was not a claim against the United States. It was a sale of property against which the United States claims a leasehold interest and has brought an action to protect its leasehold interest. There are no cases in point cited by the Appellant, and the closest case is from the Sixth Circuit 1951, *United States vs. Jordon*, 186 F. 2d, 808:

> (12) Two of the claimants, * * * purchased their respective tracts of land from former owners and lessors after the termination of the Government's leaseholds, without knowledge that the value of the timber had been destroyed. Upon later discovery of the damage, the former owners executed assignments to the purchasers by which they assigned any and all claims against the Government "arising out of express or implied covenants in the aforesaid lease." The Government contends that the assignments are contrary to the provisions of the anti-assignment statute, 31 U.S.C.A. § 203, and that the assignees are barred from prosecuting their respective claims herein. *United States v. Gillis*, 95 U.S. 407, 24 L. Ed. 503. There are numerous exceptions to the literal wording of the statute. *Goodman v. Niblack*, 102 U.S. 556, 559-561, 26 L. Ed. 229; *Erwin v. United States*, 97 U.S. 392, 397, 24 L. Ed. 1065; *Seaboard Air Line Ry. v. United States*, 256 U.S. 655, 41 S. Ct.

611, 65 L. Ed. 1149; *Western Pacific R.R. Co. v. United States*, 268 U.S. 271, 45 S. Ct. 503, 69 L. Ed. 951; *Old Colony Ins. Co. v. United States*, 6 Cir., 168 F. 2d 931, 934; *United States v. South Carolina Highway Dept.*, 4 Cir. 171 F. 2d 893, 899. In the present case, the leases with the former owners ran in favor of the owners, their heirs, "successors and assigns." The claims here asserted arise out of these leases containing the express or implied covenants, as found by the trial judge, entitling the owners and their assigns to recover damages to the standing timber in addition to the rental value paid. The subsequent written assignments were incidental to the prior sale of the land, and in furtherance of the vendor's obligations under their deeds of conveyance. The purposes of the statute were in no way violated. *Goodman v. Niblack*, *supra*, 102 U.S. at page 506. We agree with the ruling of the District Judge.

Second: This action affects the future use of land in question. By bringing the action, did the United States mean to forbid the merchandising of this property, subject to their interests therein. Obviously the restraint of the handling of properties would be clearly against public policy, and unless there is some specific statute forbidding it, would not be sanctioned by the court. It was not the purpose of the assignment statute to forbid the sale of land. The real party in

interest, is the one whom the government would deal with for the next fifteen years, and should be the one with whom they decide whether or not they have a lease. The purpose of 31 USC § 203, was not to stop the sale of land, on which the government was trying to prove a long term lease. The purpose of the statute is well set out in the case of *Matter of Ideal Mercantile Corporation*, a 1957 case, from the Second Circuit, 244 F. 2d, 828:

> (7) The Assignment of Claims Act was first enacted in 1853, purportedly (1) "to prevent persons of influence from buying up claims against the United States, which might then be improperly urged upon officers of the Government," (2) "to prevent possible multiple payment of claims, to make unnecessary the investigation of alleged assignments, and to enable the Government to deal only with the original claimant," and (3) "to save to the United States 'defenses which it has to claims by an assignor by way of set off counter claim, etc., which might not be applicable to an assignee.' " *United States v. Shannon*, 1952, 342 U.S. 288, 291-292, 72 S. Ct. 281, 283-284, 96 L. Ed. 321; see *United States v. Aetna Cas. & Surety Co.*, 1949, 388 U.S. 366, 373, 70 S. Ct. 207, 94 L. Ed. 171; *Goodman v. Niblack*, 1880, 102 U.S. 556, 560, 26 L. Ed. 229; *Spofford v. Kirk*, 1878, 97 U.S. 484, 490, 24 L. Ed. 1032.

It is interesting to note that all of the cases cited in the annotations, 31 USCA § 203, involve claims for money of one kind or another, prosecuted by someone against the Government or one of its branches. All cases referred to by the text books, are similar cases and nowhere can I find an interpretation of the word "claim" to mean other than a claim of compensation or a claim of money. It is to be noted in the case at bar, the claim of money, if any, to be had against the United States has already been ruled to be a claim to be taken up in the Court of Claims. This action is solely for the purpose of establishing whether or not the United States has a lease. I do not believe a claim is involved.

Third: In answer to the Government's argument for dismissal under the assignment clause, is found in the Statute itself. 31 USC, P 203 states:

> "The provisions of this section shall not apply to payments for rent of post office quarters made by postmasters to duly authorized agents of the lessors."

It can be said, of course, that this uninterpreted amendment to the law could mean many things, but its obvious meaning is that it exempts claims for rents,

under a lease which at least the Government contends to be a duly authorized, executed, binding and valid lease made by the postmaster.

ARGUMENT ON SUBSTITUTION OF PARTY APPELLANT

The Court, no doubt has already seen the motion to substitute parties appellant. At the time of an assignment of the cause of action to Joseph P. Mentor, Jr., notice was given to the court that there had been an assignment.

No motion to substitute was made because the attorney for the appellant believed the Honorable Court would, if it wanted, on its own motion, direct a change of parties appellant. It was felt by the writer that it would probably be less confusing for the nominal party appellant to be First Federal Savings & Loan Association of Bremerton in all the courts, so long as all parties knew the real party in interest was Joseph P. Mentor, Jr. No one is being misled.

The court's power to do this is amply set forth in the Appellee's Answering Brief on Page 18. The text, *Barron and Holtzoff*, under Volume 2, page 238,

P 621, commenting on Rule 25, says: "Rule 25 does not apply to proceedings on appeal, they are governed by rules of the Court of Appeals, under which substitution is freely allowed." If the above entitled court has passed a specific rule on this subject, it has escaped my perusal, but I do ask the leniency of the court, in the event I have been incorrect in my method of getting substitution of parties.

Normally this case would not require a reply brief, if it were not for the question of dismissal, which has been previously argued. However, since a reply brief is in the offing, I make the following comments on the merits of the case.

ARGUMENTS AS TO MERIT OF THE CASE

1. Application of State Law as Versus Federal Law.

The argument in favor of federal law is very well set out on Pages 24 through 29 of the Appellee's Brief. The Appellee on Page 29 of his brief concludes as follows:

> "It follows that the district court properly rejected the peculiar state rule and correctly concluded that the agreement to lease created an equitable right in the United States which could be specifically enforced against a subsequent purchaser or encumbrancer who acquires an interest with notice of that equitable interest."

Washington has been a State for some fifty (50) years. It is a rather progressive State, and there is nothing peculiar about its laws. I certainly think this argument is very poor. The State law is a good law and is useable by everyone in the State of Washington. It would not hurt the post office department to conform to it and find that they can let out their bids and get their leases, the same as everyone else does in the State.

On Page 29 of Appellee's Brief, there is a footnote which says that he believes the State law might result in a lease under the situation herein set forth. This is incorrectly shown by the cases cited in the Appellant's Opening Brief, as there is nothing here to take the case out of the Statute of Frauds. Had the United States gone into possession and partially executed their lease by possession without knowledge that Appellant had a mortgage, the lease would have been

taken out of the Statute of Frauds and the Government would have an enforceable lease. This would constitute a part performance coupled with an interest. But the part performance required is, of course, occupation and some expenditure or other act which would put them in an irreparable situation.

All other questions are answered in Appellant's Opening Brief.

Respectfully submitted,

MARION GARLAND, JR.,

Attorney for Appellant.

No. 17303

United States
Court of Appeals
for the Ninth Circuit

FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF BREMERTON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Western District of Washington, Northern Division.

Phillips & Van Orden Co., 4th & Berry, S. F., Calif.—Rec. 4/11/61—Printed 4/25/61

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF COUNSEL

MARION GARLAND,
205 Dietz Building,
Bremerton, Washington,

Attorney for Appellant.

CHARLES P. MORIARTY and
JAMES F. McATEER,
1012 U.S. Courthouse,
Seattle, Washington,

Attorneys for Appellee.

United States District Court, Western District of Washington, Northern Division

No. 4959

UNITED STATES OF AMERICA,

Plaintiff,

vs.

EARL L. SANDS, a/k/a E. L. SANDS, and RITA SANDS, His Wife; JAMES E. COMRADA and FLORENCE COMRADA, His Wife; FREDERICK D. HOLBROOK, Trustee in Bankruptcy of JAMES E. COMRADA, and FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF BREMERTON,

Defendants.

PRETRIAL ORDER

As the result of a pre-trial conference heretofore had, whereat plaintiff was represented by James F. McAteer, Assistant United States Attorney; and the defendant Earl L. Sands by David L. Jamieson, and the defendant Frederick D. Holbrook by Eleanor Edwards, and First Federal Savings and Loan Association of Bremerton by Marion Garland, and the defendants James E. Comrada and Florence Comrada, his wife, not appearing, the following issues of fact and law were framed and exhibits identified.

Admitted Facts

The following are the admitted facts herein:

1. This is a suit of a civil nature brought by the United States of America, and jurisdiction therefor rests on 28 U.S.C.A. 1345. An actual controversy exists between plaintiff and the parties defendant and each of them, and plaintiff seeks a declaration of rights and other legal relations pursuant to 28 U.S.C.A. 2201.

2. The Postmaster General, hereinafter mentioned, is an agent of the plaintiff, United States of America, a corporation sovereign and at all times and in all matters hereinafter mentioned, said Postmaster General, his officers and agents acted for and on behalf of the plaintiff, which was and is the real party in interest under and by virtue of Article 1, Section 8 of the Federal Constitution and 39 U.S.C.A 794f.

3. The defendants, Earl L. Sands, a/k/a E. L. Sands, and his wife, Rita Sands, are and were at all times material to this complaint husband and wife and comprise a marital community under the laws of the State of Washington; that said defendant and his wife reside at Winslow, Washington, in the Northern Division of the Western District of Washington.

4. The defendants, James E. Comrada and his wife, Florence Comrada, are and were at all times material to this complaint husband and wife and comprise a marital community under the laws of the State of Washington; that said defendant and his wife reside at Winslow, Washington, in the

Northern Division of the Western District of Washington.

* * *

6. The defendant First Federal Savings and Loan Association of Bremerton is a federal savings and loan association organized under the laws of the United States and doing business in the State of Washington, having its principal place of business in Bremerton, Washington, in the Northern Division of the Western District of Washington.

7. The defendants, James E. Comrada and Florrence Comrada, his wife, in a proposal to lease quarters, dated June 25, 1955, as amended December 1, 1955, and accepted by the Postmaster General on February 27, 1956, agreed to construct a post office building at Winslow, Washington (now known as Bainbridge Island Station of Seattle, Washington), according to certain specifications and to lease the property to the United States for a term of fifteen (15) years at an annual rental of $1,480.00 with one 5-year renewal option at $1,320.00 a year. A copy of said proposal to lease quarters, as amended and accepted, is attached hereto, marked Exhibit "A," and by this reference made a part hereof as though fully set forth.

8. On January 28, 1956, a contract was entered into between the defendant James E. Comrada and the defendant Earl L. Sands, d/b/a Sands Construction Company, wherein the defendant Earl L. Sands agreed to construct the post office building at Wins-

low, Washington, for a total price of $17,050.00 in accordance with Postal specifications, as per plans furnished.

9. On May 23, 1956, the defendants, James E. Comrada and Florence Comrada, his wife, conveyed by statutory warranty deed to the defendant E. L. Sands, the real estate on which the aforementioned post office building was under construction. Said real estate is more particularly described as follows:

> That part of the Northwest quarter of the Southwest quarter, Section 26. Township 25 North, Range 2 E.W.M., described as follows:

* * *

10. On July 25, 1956, the defendants, E. L. Sands and Rita D. Sands, his wife, executed a mortgage on the post office site and another parcel of land to the defendant First Federal Savings and Loan Association of Bremerton, to secure a note of even date in the amount of $21,000.00. The purpose of said mortgage and note was to finance the construction of a post office building on the mortgaged property.

11. The defendant First Federal Savings and Loan Association of Bremerton in Cause No. 39153 in the Superior Court of the State of Washington for Kitsap County, brought an action to foreclose the foregoing mortgage. A judgment of foreclosure was entered in said action, and on March 25, 1960, a Certificate of Sale of Real Estate was issued by the Sheriff of Kitsap County to First Federal Sav-

ings and Loan Association of Bremerton, covering the property mortgaged by the mortgage of July 25, 1956. The United States was dismissed from the action as a party defendant on January 18, 1960.

12. On December 1, 1956, the Post Office Department began occupancy of the building built by defendant Sands, and located on the property described in paragraph 9, notwithstanding the fact that the building was not fully completed, and such occupancy has continued at all times since December 1, 1956.

* * *

14. In November, 1958, the defendants, James E. Comrada and Florence Comrada, executed a quitclaim deed to E. L. Sands and Rita D. Sands covering the said post office site.

* * *

16. A formal lease between the plaintiff, United States of America, or the United States Post Office Department, has never been executed with the defendants, James E. Comrada and Florence Comrada, his wife, or with the defendants Earl L. Sands and Rita Sands, his wife, or with the defendant First Federal Savings and Loan Association.

* * *

18. That the Sheriff's Certificate of Sale of Real Estate issued on March 25, 1960, in favor of First

Federal Savings and Loan Association of Bremerton, makes them owners of the property (post office site, Winslow, Washington), free and clear of any interest of James E. Comrada and Florence Comrada or Frederick D. Holbrook, their trustee in Bankruptcy, or Earl L. Sands and Rita Sands, his wife, subject only to rights of redemption under the law of the State of Washington.

19. No payments of rent (or damages) have been made by plaintiff to any of the parties hereto except payments made by plaintiff for completion of construction and for repairs.

20. That on May 23, 1956, a written contract was entered into between James E. Comrada, Florence E. Comrada, and Earl L. Sands, which contract superseded the contract of January 28, 1956. In this contract the parties agreed, inter alia, as follows:

"2. The contractor [Sands] will in a good, substantial and workmanlike manner, and in strict compliance with, and conformity to, the drawings, plans and specifications prepared by the United States Government, which said drawings, plans and specifications are made by reference an integral part of this contract, provide all the materials and perform all the work for the construction of that certain post-office building at Winslow, Washington, * * *

"10. It is understood and agreed that the owner will pay to the contractor for the work and ma-

terials involved in and appertaining to this contract the sum of $22,239.99, [in certain specified installments] * * *

"13. The owner [Comrada] shall assign to the contractor all of his right, title and interest in the rents, and any other income accruing from the building constructed as heretofore agreed, and any and all such income shall be paid to the contractor, his heirs or assigns, and applied against indebtedness created by this contract.

"As soon as the principal and interest is paid to the contractor by the owner, then the contractor shall give the owner a warranty deed and the rents and income under the assignment shall immediately revert to the owner.

"14. As a further requirement on the part of the owner it shall be necessary, and he shall give to the contractor a warranty deed on the above-described real property, * * *"

* * *

25. On July 17, 1956, Earl L. Sands applied for a mortgage loan on the property described in paragraph 9 of Admitted Facts herein referred to as the post office property in the amount of $8,000, from First Federal Savings and Loan Association of Bremerton. At that time First Federal Savings and Loan Association of Bremerton held an existing mortgage on which the balance due was $12,454.12

on the adjacent "restaurant property." The loan application was amended to provide for a loan of $21,000, to be secured by the mortgage of both the restaurant and post office property, and that $12,-454.12 of such loan would be used to satisfy the existing encumbrance on the restaurant property.

In the loan application the improvements located on the real estate were designated as a restaurant built in 1955, and a post office built in 1956. The post office was described as having one (1) room and being of concrete block exterior finish. It was stated in the loan application that $8,545.88 of the loan proceeds were to be used for "completing building the above-described post office." At the time of making application for the loan, Earl L. Sands stated to Miss E. A. Sprague, an assistant secretary of the savings and loan association, that there was an existing lease of the restaurant to James Comrada for a rental of $375.00 per month, but that there was no lease of the adjacent post office property. Mr. Paul Rosenbarger, president of the savings and loan association, personally made a physical inspection and appraisal of the real estate that Sands offered as security for the loan. This physical inspection disclosed two improvements on the subject property.

> A restaurant, 21 feet, 2 inches by 100 feet, with partial basement 21 feet, 2 inches by 11 feet, which improvement was appraised at $16,-051.

A post office, 27 feet by 74 feet, which improvement was appraised at $16,453 (when completed).

The post office was approximately 50 per cent completed. Mr. Rosenbarger knew that the building was being built for occupancy as a United States Post Office, and designated the building as a post office in his appraisal report.

First Federal Savings and Loan Association did not inquire of the Post Office Department or of any person other than Sands, the mortgagor, whether the Post Office Department had a lease agreement prior to accepting the loan.

First Federal Savings and Loan Association of Bremerton insured the mortgage from Sands, dated July 25, 1956, by a title insurance policy secured from the Kitsap County Title Insurance Company (Policy No. H-78255-B, ATA form dated August 28, 1956). An employee of the title insurance company physically inspected the property to be mortgaged and observed that the building under construction was to be used as a post office.

26. On or about November 9, 1956, the defendant First Federal Savings and Loan Association of Bremerton, was requested to sign a form acknowledging that the mortgage of July 25, 1956, executed by Sands, was subordinate to the lease of the Post Office Department. The First Federal Savings and Loan Association of Bremerton declined to execute the subordination agreement.

Plaintiff's Contentions

Plaintiff's contentions are as follows:

1. That the accepted proposal to lease quarters (paragraph 7 Admitted Facts) as between the Post Office Department and the defendants, James E. Comrada and Florence Comrada, was valid as a lease under Federal law.

2. In January of 1956 and prior to May 23, 1956, the defendant, Earl L. Sands, had actual or constructive knowledge of Comrada's agreement with the United States and of the terms and conditions therein.

3. Sands took title to the property on May 23, 1956, subject to the terms of the accepted proposal to lease quarter which was binding on him as a lease under Federal law.

* * *

5. The plaintiff has occupied the post office premises at Winslow, Washington, at all times since December 1, 1956. Under the terms of the proposal to lease quarters, as amended and accepted, there is due and owing from the plaintiff as of March 25, 1960, for rent during such 40-month period, the sum of $4,909.44 less the aforementioned cost of completion of construction and repairs in the amount of $932.35, making the amount of $3,977.09.

Pursuant to Rule 67, Federal Rules of Civil Procedure, and 28 U.S.C.A. 2041, plaintiff on December

4, 1959, deposited into the registry of the court the sum of $3,529.25.

6. The facts and circumstances surrounding the Government's initial entry upon the property in December, 1956, with Sands' permission, the completion of the improvements by the Government with Sands' knowledge and consent and the subsequent tender to him of rent by the Government on numerous occasions are all facts which constitute partial performance of Comradas' lease agreement by Sands and serve to take it out of the statute of frauds.

7. The validity and effect of the proposal to lease quarters as amended, and accepted by the Government are to be determined by Federal, not State law.

8. On July 25, 1956, prior to accepting a mortgage on the site of the proposed post office at Winslow, Washington, the defendant First Federal Savings and Loan Association of Bremerton, had notice of facts sufficient to put it on inquiry that the United States Government would occupy the building as a post office under a prior lease. At such time the defendant First Federal Savings and Loan Association of Bremerton, in the conduct of sound banking practice, should have inquired of Mr. Charles Seary, the local postmaster of Winslow, Washington, or of the appropriate post office officer in Seattle, Washington, of the status of the post

office in and to the Sands' property, and such inquiry would have disclosed the Comrada post office agreement (paragraph 7 Admitted Facts). The mortgage of July 25, 1956, on such property was subject to the rights of the Government under the proposal to lease agreement.

* * *

Contentions of Defendant First Federal Savings and Loan Association of Bremerton

The Defendant, First Federal Savings and Loan Association of Bremerton, Contentions are:

1. That at the time they executed the mortgage with Earl L. Sands and Rita Sands, on July 25, 1956, the United States Government was not in possession, had not recorded any lease, had by no other acts acted to stop the operation of the statute of frauds which provides that all interests in real estate shall be signed and acknowledged by the person to be bound thereby, nor had they complied with the recording statute.

2. The First Federal Savings and Loan Association of Bremerton contends that their recording of the mortgage on July 25, 1956, put the United States Government on notice of their mortgage and that in addition thereto the United States Government had actual notice of the mortgage before they took possession or changed their position under the purported lease.

3. The Defendant, First Federal Savings and Loan Association of Bremerton, contends when they foreclosed their mortgage and received the Sheriff's Certificate of Sale on the 25th of March, 1960, that they became the owner in fee as against all parties including the United States Government, subject only to the right of redemption.

4. That First Federal Savings and Loan Association of Bremerton has no knowledge or facts that would put them on notice of any unrecorded agreements between James E. Comrada and Earl L. Sands, and are not bound thereby.

5. That the post office structure was one commonly referred to by real estate rental agencies as a general purpose commercial building, to designate it from a one-purpose building.

6. That a reasonable rental value of the premises occupied by the United States Post Office is $330.00 per month and that they should be given a judgment for that amount from the 25th day of March, 1960, until the date of judgment.

* * *

Issues of Fact

The following are the issues of fact to be determined by the Court herein:

1. On January 28, 1956, and on May 23, 1956, what knowledge did Earl L. Sands have of the Post Office Department's intention to occupy the post

office building to be built at Winslow, and of the terms of the proposal to lease.

2. When did defendant Sands first learn of the contract to lease between Comrada and the Government and the amount of monthly rental provided for in such contract.

* * *

Issues of Law

The following are the issues of law to be determined by the Court herein:

1.(a) Was the Proposal to lease agreement valid in law or equity to create an enforceable interest in the property described therein in favor of the Government against the Comradas.

(b) Under Federal law, are such unacknowledged agreements to lease valid between the parties, although not executed with the formalities required of leases under State law.

2. Where a building contract provides for the furnishing by a contractor of labor and materials for the construction of a post office building to be built in "strict compliance with, and conformity to the drawings, plans, and specifications prepared by the United States Government" at a cost to the owner of the real estate of $22,239.99, and provides for the assignment of rents and income of the building to be built on the owner's property to the contractor to be applied against the indebtedness of the

owner, and provides for a conveyance from owner to contractor by warranty deed of the real estate on which the building is to be built, but further providing for a reconveyance upon payment to the contractor of the principal and interest.

(a) Does such a contract contemplate that the warranty deed from owner to contractor shall be given subject to the owners' obligation to lease the building to the Government at the rental and for the term previously agreed between the owner and the Post Office Department.

(b) Does such a contract contemplate that the owner (who is entitled to a reconveyance upon fulfillment of certain conditions) shall manage the property and that the contractor shall hold subject to the terms of leases or rental agreements entered into between the owner and the Post Office Department.

3. On May 23, 1956, was Earl L. Sands on notice of the Post Office Department's intention to occupy the proposed building and did he take title to the post office site as assignee of James E. Comrada's and Florence Comrada's contract rights and obligations with the Post Office Department.

* * *

6. Are the terms and conditions of a "proposal to lease quarters" entered into between the Post Office Department and an owner of real estate (Com-

rada), binding upon a person acquiring title (Sands), to the property involved with notice of the post office's intended use and constructive notice of the post office's claim of lease to such property.

7. Are the terms and conditions of a "proposal to lease quarters" entered into between the Post Office Department and an owner of real estate binding upon a mortgagee who accepts a security interest in the property involved with notice of the post office's intended use and intention to lease such property.

8. Did the defendant First Federal Savings and Loan Association of Bremerton, as purchaser under the Sheriff's Certificate of Sale (paragraph 18 of Admitted Facts) take subject to the rights of the Post Office Department under the proposal to lease agreement (paragraph 7 of Admitted Facts).

* * *

10. If the proposal to lease agreement is governed by State law and is invalid if unacknowledged unless equitable factors are present, has there been sufficient part performance by the lessee Post Office Department to make the agreement enforceable as against the lessor.

* * *

11. If the proposal to lease agreement is construed as an oral lease because not acknowledged as required by State law and if not enforceable in equity under the doctrine of partial performance,

was such agreement effective to create a tenancy from month to month or from period to period. If not a tenant from month month, but from period to period, what was the duration of the period, or was the Government a tenant at will.

* * *

13. Is an agreement to lease real property valid in the State of Washington, if it does not contain a legal description of the premises.

* * *

Action by the Court

The foregoing pre-trial order has been approved by the parties hereto, as evidenced by the signatures of their counsel herein; and upon the filing hereof the pleadings pass out of the case and are superseded by this order, which shall not be amended except by agreement of the parties and approval of the Court.

Dated this 13th day of September, 1960.

/s/ WILLIAM J. LINDBERG,
United States District Judge.

Approved:

/s/ JAMES F. McATEER,
Assistant U. S. Attorney.

/s/ ELEANOR EDWARDS,
Attorney for Defendant
Frederick D. Holbrook.

/s/ DAVID L. JAMIESON,
Attorney for Defendant
Sands.

/s/ MARION GARLAND,
Attorney for Defendant First Federal Savings & Loan Association of Bremerton.

Lodged August 29, 1960.

[Endorsed]: Filed September 13, 1960.

United States District Court, Western District of Washington, Northern Division

No. 4923

EARL L. SANDS and RITA D. SANDS, Husband and Wife,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

No. 4959

UNITED STATES OF AMERICA,

Plaintiff,

vs.

EARL L. SANDS, a/k/a E. L. SANDS, and RITA SANDS, His Wife; JAMES E. COMRADA and FLORENCE COMRADA, His Wife;

FREDERICK D. HOLBROOK, Trustee in Bankruptcy of JAMES E. COMRADA, and FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF BREMERTON,

Defendants.

MEMORANDUM OPINION

This memorandum opinion relates to two separate actions consolidated for trial because of the identity of the parties involved and a similarity of issues. The first action, number 4923, was brought by Earl L. Sands and Rita D. Sands against the United States Government and as amended by stipulation and pretrial order the plaintiffs seek damages in the amount of $9,999.99 for an alleged unlawful taking without just compensation. In the second action, number 4959, brought by the United States against Earl L. Sands and wife, James E. Comrada and wife, Frederic P. Holbrook, Trustee in Bankruptcy of James E. Comrada, and First Federal Savings and Loan Association of Bremerton, the United States seeks a declaratory judgment as to the rights of the respective parties arising out of a proposal to lease certain property for use as a post office. Frederic P. Holbrook, Trustee in Bankruptcy of James E. Comrada, and Earl L. Sands, entered into an agreement whereby Holbrook, in consideration of Sands assigning to him any proceeds in this action up to $1,400, assigned to Sands any rights or interest he may have in any additional proceeds of this action, and withdrew as a party.

Neither James nor Florence Comrada took part in the trial of this lawsuit.

Inasmuch as the pretrial orders set out in considerable detail the admitted and undisputed facts it will serve no useful purpose to repeat them all at this time. However, a brief resume of the circumstances which gave rise to these actions will help in clarifying the issues involved.

In response to a request for bids to furnish postal facilities on Bainbridge Island, James Comrada submitted a proposal to lease quarters to the Postmaster General in June of 1955. This proposal was amended in December of that year and accepted by the Postmaster General in February of 1956. In January, 1956, Comrada entered into a contract with Sands, whereby Sands agreed to construct a post office building on property owned by Comrada for an agreed figure. On May 23, 1956, Comrada conveyed to Sands, by statutory warranty deed, the real estate on which the building was then under construction. On July 25, 1956, Sands executed a mortgage on this property, as security for a loan, to the First Federal Savings and Loan Association of Bremerton. That mortgage has subsequently been foreclosed and the First Federal Savings and Loan Association has become the legal owner of the property subject only to Sands' right of redemption.

The construction of the building did not proceed as rapidly as was desired by the Government and in the fall of 1956, they began to urge an early comple-

tion. During October, the Government began to insist that the building be ready for occupancy not later than December 1, and it was at this point that the dispute arose as to the terms of the occupancy. On December 1, 1956, the Government secured possession of the building and has continued to operate a postal facility therein to the commencement of this action.

It is clear that the basic issue in this case is the nature and validity of the alleged lease or proposal to lease which is Plaintiff's Exhibit No. 1. At the outset we are confronted with the question of whether this document is to be construed as a lease or as an agreement to lease.

As I announced at the commencement of the trial, Federal law and not Washington law should govern this suit. At this point I will briefly state my reasons for so holding. When the United States Government sets out to establish postal facilities, they are engaged in performing an essential governmental function as specifically empowered by the Constitution. Whenever the Government is engaged in such an activity, an activity which by its very nature will be carried on in all cities, towns and communities throughout all States of the Union, it is important that uniformity be achieved. To require that negotiations for securing postal facilities be conducted within the framework of each State's laws, which are admittedly varied and often contradictory, would impose an intolerable burden upon the Government. The respect which the Federal Government

normally accords the laws of each individual state must give way in the interest of uniformity when the Government is performing a Constitutional function. This was the holding of the United States Supreme Court in Clearfield Trust Company v. United States, 318 U.S. 363 (1943) and the same reasoning used there applies to this case. A similar conclusion was also reached in United States v. Allegheny County, 322 U.S. 174 (1944) and United States v. View Crest Garden Apts., Inc., 268 F. 2d 380 (9 Cir. 1959). It should be observed in passing that the statement made in Erie Railroad v. Tompkins, 304 U.S. 64 (1938) that "there is no Federal common law" has been limited in its application to those cases in which Federal jurisdiction is based on diversity of citizenship. See United States v. Standard Oil Co., 332 U. S. 301 (1947).

Proceeding, therefore, under the mandate of Federal law, is the proposal to lease quarters executed by Comrada and the Government to be construed as a lease or as an agreement to lease? The Government to be construed as a lease or as an agreement to lease? The Government contends that under Federal law this proposal should be construed as a lease, not merely an agreement to lease. With this I cannot agree. As is well stated in the American Law of Property, §3.17:

> "Whether a given transaction results in a lease or an agreement to give a lease is a matter of intention to be determined from the language

and acts of the parties. No precise words are necessary to create a lease, but the use of language of present demise—demise, lease, to farm let—indicates that a lease is intended."

In United States v. 257.654 Acres of Land, etc., 72 F. Supp. 903 (D.C. Haw. 1947) the court was faced with a problem similar to the present one. That court emphasized that it is a question of intention. Did the parties to the agreement intend that it should be a presently-operative lease or an agreement to later execute a lease? In addition, the district court pointed out that where the instrument in question provides for the later execution of a lease that fact is some evidence that the parties did not intend a present demise of the premises.

A consideration of all the exhibits and testimony leads irresistibly to the conclusion that both Comrada and the Government did not intend the proposal they executed to be a lease. Not only does the proposal itself provide that the undersigned "agrees to lease," but the testimony of the Government's own witness was to the effect that a later lease was contemplated and would be entered into. Nowhere was any language used which indicates that a present demise of the premises was intended. Any conclusion that could be drawn from the fact that Comrada signed the sample copy of the lease on the reverse side of the proposal, which action is at the most ambiguous, can have no effect on the result. Unilateral intention is not sufficient, and as I have already indicated, the Government did not intend

to enter into a lease at that time. Therefore, it is my conclusion that the proposal to lease is in law an agreement to execute a lease in the future.

This conclusion leads then to the next consideration, that is, what is the legal effect of an agreement to lease. What interests did the execution of this agreement and the action of the parties thereunder, create?

The prevailing general rule is that an agreement to lease creates a legal relationship similar to that created by an earnest money agreement. That is, it creates an equitable right in the proposed lessee, and this equitable right can be specifically enforced against the proposed lessor or his successor in interest, provided the general requirements for specific performance are met. However, conveyance of the property to a bona fide purchaser or the creation of a subsequent interest by a bona fide encumbrancer will cut off the equitable rights of the proposed lessee. Halsell v. Renfrow, 202 U.S. 287 (1906). On the other hand, however, if the subsequent purchaser or encumbrancer obtains his interest in the property with notice of the rights of the proposed lessee or vendee, he is bound by those rights and the contract can be specifically enforced against him. See Ebensberger v. Sinclair Refining Co., 165 F. 2d 803 (5 Cir. 1948).

Therefore, the key factual question, as I see it, is, did Sands and/or the First Federal Savings and

Loan Association have notice of the agreement to lease executed by the Government and Comrada?

Legal notice can be either one of two types—actual or constructive. Constructive notice is generally held to be that notice which a person is deemed to have by operation of law, commonly through the recording statutes. Had the Government recorded this agreement, assuming it was recordable, Sands and the First Federal Savings and Loan Association would have had constructive notice of the Government's interest in the property and this would have ended the case. However, the instrument was not recorded. Consequently, unless Sands and First Federal had actual notice of the Government's interest. they would, I believe, have the status of a bona fide purchaser and a bona fide encumbrancer.

Like notice itself, actual notice also consists of two types. In its purest sense actual notice is knowledge of the essential facts involved. There is nothing in the evidence to indicate that either Sands or First Federal had actual knowledge of the agreement to lease and its terms. However, actual notice may also consist of implied or inquiry notice.

As was well stated by the Second Circuit Court of Appeals in The Tompkins, 13 F. 2d 552 (2 Cir. 1926):

> "If a person has knowledge of such facts as would lead a fair and prudent man, using ordinary thoughtfulness and care to make further accessible inquiries, and he avoids the inquiry,

> he is chargeable with the knowledge which by ordinary diligence he would have acquired. Knowledge of facts, which to the mind of a man of ordinary prudence, beget inquiry, is actual notice, or, in other words, is the knowledge which a reasonable investigation would have revealed."

See also The Lulu, 77 U.S. 192, page 200 (1868) where the United States Supreme Court uses much the same language.

Thus it can be seen that if either Sands or the First Federal Savings and Loan had knowledge of facts which would excite a prudent man to make further reasonable inquiry, and such an inquiry, if made, would have disclosed the interest which the Government had in this property, they would be charged with having such knowledge and their interests would be subject to that of the Government. It is my opinion, and I so find, that such was the case. Both Sands and First Federal Savings and Loan Association are chargeable with actual notice of the Government's interests.

It is undisputed that both Sands and the First Federal Savings and Loan Association knew that there was a building being constructed on the property and that the building was to be used for a particular purpose—a post office. Sands knew this by his own admission, and the First Federal Savings and Loan knew through a statement on the loan application and an inspection made by their

president. This was stipulated in the pretrial order in paragraph 25. The presence of a building being built for a particular purpose and for use by a particular tenant should be sufficient notice to stimulate an investigation to find out what interest or arrangement the eventual occupant might have with the present owner. To do less would fail to fulfill the duty imposed by the law. Adams v. Willis, 83 S.E. 2d 171 (S.C. 1954), and Rochester Poster Advertising Co. v. Smithers, 231 N.Y.S. 315 (1928) are cases in which a structure on the property gave notice of the rights of another. It does not seem reasonable that a person would be constructing a post office on his property with only a hope that the Post Office Department might, in the future, rent it from him. Reason and common experience dictate that some sort of an arrangement or agreement must have existed. The evidence in this case shows that any investigation or inquiry made either of the local postmaster or the postal inspector would have led to a disclosure that the Government did have an agreement to lease the premises after construction of the building as well as the terms of such proposed lease. The fact that this information was not as readily available as are public records should make no difference. The postal inspector testified that he would have given the information to any properly interested person seeking it for legitimate purposes, or at least have referred them to Comrada. Further, there has been no evidence that Comrada, had he been questioned, would not have disclosed the details of his agreement.

Therefore, it is my conclusion that under the evidence a reasonably prudent person would have sought further information. Had inquiry been made by Sands or First Federal as to the particulars of any rental or lease arrangement existing with respect to the building under construction, full information would have been forthcoming from the postal inspector or, so far as the evidence establishes, from Comrada. As to the suggestion made by First Federal Savings and Loan, that they performed their duty of making reasonable inquiry when they asked Sands if the Government had a lease, it does not appear to me to be prudent banking practice to accept without further investigation a prospective borrower's statements as to the facts surrounding his security.

Both Sands and the First Federal have urged other contentions to defeat the Government's claim with respect to specific performance. One argument is that the terms of the agreement are not sufficiently definite to be specifically enforced. This is not supported by the facts. The proposal to lease states that the rental is to be so much per year, payable monthly. The fact that the exact day of the month on which the rental is due is not material. It is also alleged that the description of the property in the agreement is not specific enough. As to this contention, it is my view that the general rule as to the degree of certainty required with respect to description of real estate in contracts of lease or sale thereof has been met by the Proposal to Lease, itself, when

considered in light of other admissible evidence as to the identity of the real estate and building involved. See 49 Am. Jur., Statute of Frauds, Sections 347, 348, 349, beginning page 655; 37 C.J.S., Stat. of Frauds, Sections 182, 183, 184, beginning page 668. Although the description of the premises, as set out in the proposal to lease certainly leaves much to be desired, the fact remains, first, there was never any question in the minds of any of the parties as to the specific property involved, and, second, the Government was in possession of the property at the time of the commencement of this action, and therefore any uncertainty as to the location of the property has been cleared up by the action of the parties. 81 C.J.S., Specific Performance, Section 33. The peculiar Washington rule which requires that agreements such as this contain a legal description of the property involved before specific performance will be ordered is not controlling and should not be applied here. As I indicated at the outset, Federal law is applicable and while in determining what the Federal law is, I may be free to follow State court decisions as indicative of what the law is, or should be, to adopt the Washington rule would be accepting an extreme minority rule which, as far as I can ascertain, has not been followed by any other State in the Union.

The "clean hands" doctrine has also been raised as a defense. It is my opinion that this contention is without merit. The circumstances surrounding the obtaining of the key to the building by the Winslow

postmaster, although disputed, cannot be held to be unconscionable conduct sufficient to bar equitable relief. At the time the key was obtained the Government under the interpretation I have adopted had a right to possession and they were only attempting to enforce this right by the fastest peaceable means. As for the contention that the Government was guilty of bad faith by not having this agreement recorded, this also is without merit. Certainly recording the agreement would seem to be the most effective way for the Government to protect their interests, but the fact remains that the Government was under no duty to do so. The Government, or for that matter any private individual, should not and cannot be penalized, except perhaps under extraordinary circumstances not present here, for not doing what they are not required by law to do. A thorough search has failed to reveal any case in which the failure to record was held to be conduct sufficient to bar equitable relief, and none have been cited to me.

The final contention with respect to the validity and enforcement of the lease agreement is that there were modifications in the building which substantially changed the terms of the proposal. This contention cannot be sustained. Admittedly, there were modifications made and it is disputed as to who ordered them. However, exactly who ordered what is not important so far as the enforceability of the proposal is concerned, since I do not consider the changes that were made, as disclosed by the evidence, as being substantial.

It is my opinion that the proposal to lease is valid and binding upon Comrada, and also upon both Sands and the First Federal Savings and Loan Association, as subsequent owners or mortgagee, concluding, as I have, that they acquired their interests in the subject property with what constitutes actual notice of the rights of the United States.

The remaining issue for determination relates to the rights of the various parties to the rents accumulated under the occupancy of the post office by the United States, as well as the right of the Government to set off against said rents for the sum expended for completion of the building in the amount of $716.55 and repairs to the occupied premises since December 1, 1956, in the amount of $215.80. With respect to the cost of completion of construction, paragraph 23 of the admitted facts of the pretrial order, approved by counsel for all parties, provides, in part, as follows:

> "If the Court finds that the proposal to lease quarters between Comrada and the Post Office Department is binding on the parties hereto, such expenditure shall be a setoff of the monies due from the post office."

The Court having found the proposal to lease binding on all the parties, the amount expended by the Government for completion of the building in the amount of $716.55, may be set off against the amount owing for rents.

With respect to the admitted amount of $215.80 paid for repairs to the post office building and premises, there is no evidence to establish that the amount expended and the repairs made are other than reasonable and under the terms of the proposal to lease this item is chargeable to the lessor and may be set off against the rents owing to the owners.

The troublesome question arising in determining the portion of rent payable as between Comrada or his trustee in bankruptcy on the one hand and Sands on the other, has been simplified because of the "Stipulation and Partial Assignment of Proceeds" entered into and agreed to between Sands and the Trustee in Bankruptcy, wherein it is "Stipulated and Agreed that Frederick P. Holbrook, Trustee for James E. Comrada, holds all rights to the net sum of Fourteen Hundred Dollars ($1,400) out of any and all rents or damages due to Earl L. Sands, James E. Comrada and/or Frederic P. Holbrook, Trustee for James E. Comrada. * * *" Under this stipulation $1,400 of the rents owing by the Government are payable to Frederic P. Holbrook, Trustee in Bankruptcy for James E. Comrada, and the balance of rent owing by the United States from December 1, 1956, to March 25, 1960, less $716.55 for completion of the building, and less that portion of $215.80 expended for repair to the post office building and premises between December 1, 1956, and March 25, 1960, is payable to Sands.

Rent accruing after March 25, 1960, is payable to

the First Federal Savings and Loan Association of Bremerton or any subsequent owner.

In view of the decision I have reached with respect to the issues presented in the declaratory judgment action—Cause No. 4959—the plaintiff in Cause No. 4923 (Sands v. United States), is not entitled to recover except to the extent I have indicated, and it would appear that that action should be dismissed after entry of judgment in Cause No. 4959.

Counsel for the United States will prepare and submit upon notice and not later than November 14, 1960, findings of fact, conclusions of law and judgment or decree in accordance with the views I have expressed. Each party will pay his or its own costs.

Dated October 18, 1960.

/s/ WILLIAM J. LINDBERG,
United States District Judge.

[Endorsed]: Filed October 18, 1960.

[Title of District Court and Cause.]

No. 4923

No. 4959

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled causes consolidated for trial came on regularly before the above-entitled court

and the court having duly considered the evidence and being fully advised in the premises filed a memorandum opinion on October 18, 1960, and now enters the following:

Findings of Fact

* * *

2. Cause number 4959 is a suit of a civil nature brought by the United States and jurisdiction rests on 28 U.S.C.A. 1345. An actual controversy exists between plaintiff and the parties defendant and each of them, and plaintiff is entitled to a declaration of rights and other legal relations pursuant to 28 U.S.C.A. 2201.

* * *

10. The defendants, James E. Comrada and Florence Comrada, his wife, in a proposal to lease quarters, dated June 25, 1955, as amended December 1, 1955, and accepted by the Postmaster General on February 27, 1956, agreed to construct a post office building at Winslow, Washington (now known as Bainbridge Island Station of Seattle, Washington), according to certain specifications and to lease the property to the United States for a term of fifteen (15) years at an annual rental of $1,480.00 with one 5-year renewal option at $1,320.00 a year. Said proposal to lease was plaintiff's Exhibit No. 1.

11. On January 28, 1956, a contract was entered into between the defendant, James E. Comrada, and the defendant, Earl L. Sands, d/b/a Sands

Construction Company, wherein the defendant, Earl L. Sands, agreed to construct the post office building at Winslow, Washington, for a total price of $17,050.00 in accordance with postal specifications, as per plans furnished to Sands by Comrada.

12. On May 23, 1956, the defendants, James E. Comrada and Florence Comrada, his wife, conveyed by statutory warranty deed to the defendant, E. L. Sands, the real estate on which the aforementioned post office building was under construction. Said real estate is more particularly described as follows:

> That part of the Northwest quarter of the Southwest quarter, Section 26, Township 25 North, Range 2 E.W.M., described as follows:
>
> * * *

14. On July 25, 1956, the defendants, E. L. Sands and Rita D. Sands, his wife, executed a mortgage on the post office site and another parcel of land to the defendant First Federal Savings and Loan Association of Bremerton to secure a note of even date in the amount of $21,000.00. The purpose of said mortgage and note was to finance the construction of a post office building on the mortgaged property.

15. The defendant First Federal Savings and Loan Association of Bremerton in Cause No. 39153 in the Superior Court of the State of Washington for Kitsap County, brought an action to foreclose the foregoing mortgage. A judgment of foreclosure

was entered in said action, and on March 25, 1960, a Certificate of Sale of Real Estate was issued by the Sheriff of Kitsap County to First Federal Savings and Loan Association of Bremerton covering the property mortgaged by the mortgage of July 25, 1956. The United States was dismissed from the action as a party defendant on January 18, 1960.

* * *

18. On July 17, 1956, Earl L. Sands applied for a mortgage loan on the property described in paragraph 12 of Findings of Fact herein referred to as the post office property in the amount of $8,000.00 from First Federal Savings and Loan Association of Bremerton. At that time First Federal Savings and Loan Association of Bremerton held an existing mortgage on which the balance due was $12,454.12 on the adjacent "restaurant property." The loan application was amended to provide for a loan of $21,000.00 to be secured by the mortgage of both the restaurant and post office property and that $12,454.12 of such loan would be used to satisfy the existing encumbrance on the restaurant property. In the loan application the improvements located on the real estate were designated as a restaurant built in 1955 and a post office built in 1956. The post office was described as having one (1) room and being of concrete block exterior finish. It was stated in the loan application that $8,545.88 of the loan proceeds were to be used for "completing building the above-described post

office." At the time of making application for the loan, Earl L. Sands stated to Miss E. A. Sprague, an assistant secretary of the savings and loan association, that there was an existing lease of the restaurant to James Comrada for a rental of $375.00 per month but that there was no lease of the adjacent post office property. Mr. Paul Rosenbarger, President of the savings and loan association, personally made a physical inspection and appraisal of the real estate that Sands offered as security for the loan. This physical inspection disclosed two improvements on the subject property, a restaurant appraised at $16,051, and a post office appraised at $16,453 (when completed). The post office was approximately 50 per cent completed. Mr. Rosenbarger knew that the building was being built for occupancy as a United States Post Office and designated the building as a post office in his appraisal report. First Federal Savings and Loan Association did not inquire of the Post Office Department or of any person other than Sands, the mortgagor, whether the Post Office Department has a lease agreement prior to accepting the loan. On inquiry from the mortgagor, Mr. Sands stated there was no lease. First Federal Savings and Loan Association of Bremerton insured the mortgage from Sands dated July 25, 1956, by a title insurance policy secured from the Kitsap County Title Insurance Company (policy No. H-78255-B, ATA form dated August 28, 1956). An employee of the title insurance company physically inspected the property to be mortgaged and observed that

the building under construction was to be used as a post office.

19. Earl L. Sands had actual knowledge prior to May 23, 1956, that the building under construction at Winslow, Washington, on the property originally owned by James E. Comrada was being built for a particular purpose, a post office, and for use by a particular tenant, the United States Post Office Department.

20. Earl L. Sands and First Federal Savings and Loan Association had actual notice of the proposal to lease quarters, the agreement between the government and the Comradas, and that therefore they did not have the status of a bona fide purchaser or of a bona fide encumbrance. The actual notice consisted of implied or inquiry notice, that is, both Sands and First Federal Savings and Loan Association had knowledge of facts which would excite a prudent man to make further reasonable inquiry, and such an inquiry, if made, would have disclosed the interest which the government had in the subject property. Therefore both Sands and First Federal Savings and Loan Association are charged with having actual knowledge of the existence of the government's and Comrada's agreement to lease and they acquired their respective interests in the property subject to the interest of the United States.

21. Information concerning both the existence of the agreement to lease and the terms of the lease contemplated by the agreement to lease was

reasonably available to any properly interested person and could have been secured from either the postal inspector or the local postmaster and presumably from James E. Comrada. Had inquiry been made by Sands or First Federal Savings and Loan as to the particulars of any rental or lease arrangement existing with respect to the building, under construction, full information would have been forthcoming.

22. The proposal to lease quarters as amended and accepted by the government is a valid and enforceable agreement to execute a lease in the future. The terms of such agreement are sufficiently definite, complete and certain so as to meet the requirements of a contract that may be specifically enforced. The premises to be leased was established with certainty by the description of the real estate in the agreement itself together with the other admissible evidence as to the identity of the real estate and building involved including the action of the parties to this action. The fact that (1) there never was any question in the minds of any of the parties as to the specific property involved and (2) that a post office building was built on the subject property in accordance with the proposal to lease quarters and (3) that this is the same property that the government has occupied under claim of lease since December 1, 1956, cleared up any uncertainty as to the location of the property.

* * *

24. The government was under no duty to record the proposal to lease quarters agreement and this fact does not impair the government's eligibility for equitable relief in this case.

* * *

26. First Federal Savings and Loan did not perform their duty of making reasonable inquiry when they asked Sands if the government had a lease. Prudent banking practice demands more than accepting without further investigation a prospective borrower's statements as to the facts surrounding his security.

From the foregoing Findings of Fact, the Court makes the following:

Conclusions of Law

1. That this Court has jurisdiction of the parties hereto and the subject matter of these actions.

2. The nature, validity and enforceability of the proposal to lease quarters (Plaintiff's Exhibit No. 1) is governed by Federal law and not by Washington law. The proposal to lease quarters (hereinafter referred to as the agreement to lease) is an agreement to execute a lease in the future which created an equitable right in the proposed lessee, United States. This equitable right can be specifically enforced against the proposed lessor, James E. Comrada and Florence Comrada, his wife, or their successors in interest, Earl L. Sands and Rita Sands, his wife, and First Federal Savings and Loan Association of Bremerton. That under said

agreement to lease the plaintiff, United States, is entitled to occupy certain premises hereinafter described for a term of fifteen (15) years from December 1, 1956, at an annual rental of $1,480.00 with one (1) five-year renewal option at $1,320.00 a year. That the property covered by said agreement to lease is that property situate in the County of Kitsap, State of Washington, more particularly described as follows:

> That part of the Northwest quarter of the Southwest quarter, Section 26, Township 25 North, Range 2 E.W.M. described as follows:
>
> * * *

3. Earl L. Sands and Rita Sands, his wife, acquired title to the post office site on May 23, 1956, subject to and bound by the rights and interest of the United States under the agreement to lease.

4. The mortgage executed by E. L. Sands and Rita D. Sands, his wife, as mortgagors and First Federal Savings and Loan Association of Bremerton as mortgagee on July 25, 1956, on the post office site and adjacent property was subject to the rights and interest of the United States under the agreement to lease. On March 25, 1960, First Federal Savings and Loan Association, as purchaser under a certificate of sale after foreclosure, acquired title to the mortgaged premises subject to and bound by the said rights and interest of the United States.

* * *

9. Rent accruing after March 25, 1960, is payable to the First Federal Savings and Loan Association of Bremerton or any subsequent owner, in accordance with the terms of the agreement to lease.

10. The United States is entitled to a decree declaring that the United States shall prepare and deliver to the defendants Earl L. Sands and Rita D. Sands, his wife, and to First Federal Savings and Loan Association of Bremerton a lease in good and sufficient form in accordance with the provisions of said agreement to lease and that said lease shall be executed and acknowledged by the said defendants or their successors in interest and that thereafter said lease shall be recorded in the manner provided by law in the State of Washington.

* * *

12. In action number 4959 each party shall pay his or its own costs.

Done in Open Court this 5th day of December, 1960.

/s/ WILLIAM J. LINDBERG,
United States District Judge.

Presented and Approved by:

/s/ JAMES F. McATEER,
Assistant U. S. Attorney.

Lodged November 9, 1960.

[Endorsed]: Filed December 5, 1960.

United States District Court, Western District of Washington, Northern Division

No. 4959

UNITED STATES OF AMERICA,

Plaintiff,

vs.

EARL L. SANDS, a/k/a E. L. SANDS and RITA SANDS, His Wife; JAMES E. COMRADA and FLORENCE COMRADA, His Wife; FREDERICK D. HOLBROOK, Trustee in Bankruptcy of James E. Comrada, and FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF BREMERTON,

Defendants.

JUDGMENT AND DECREE

In the above-entitled cause, Findings of Fact and Conclusions of Law having been duly and regularly signed by the Court and filed with the Clerk of this Court, now therefore, it is hereby Ordered, Adjudged and Decreed that:

1. The proposal to lease quarters submitted by James E. Comrada and Florence Comrada, his wife, dated June 25, 1955, as amended December 1, 1955, and accepted by the Postmaster General on February 27, 1956, (hereinafter referred to as the agreement to lease), was a valid and specifically enforceable agreement to enter a lease in the future. That under said agreement to lease the plaintiff, United

States, is entitled to occupy certain premises hereinafter described for a term of fifteen (15) years from December 1, 1956, at an annual rental of $1,480.00 with one (1) five-year renewal option at $1,320.00 a year. That the property covered by said agreement to lease is that property situate in the County of Kitsap, State of Washington, more particularly described as follows:

> That part of the Northwest quarter of the Southwest quarter, Section 26, Township 25 North, Range 2 E.W.M. described as follows:
>
> * * *

2. On May 23, 1956, when Earl L. Sands and Rita Sands, his wife, acquired title to the aforementioned property, they acquired title subject to and bound by the rights and interest of the United States under the agreement to lease. On July 25, 1956, and on March 25, 1960, respectively, when First Federal Savings and Loan Association of Bremerton acquired interests in the aforementioned property as mortgagee, and as purchaser under a certificate of sale after foreclosure of said mortgage, the interests so acquired on said dates were subject to the rights and interest of the United States under said agreement to lease.

3. The agreement to lease may be specifically enforced by the United States against the defendants Earl L. Sands and Rita D. Sands, his wife, and against First Federal Savings and Loan Association of Bremerton or their successors in interest.

That the United States shall prepare and deliver to the defendants Earl L. Sands and Rita D. Sands, his wife, and to First Federal Savings and Loan Association of Bremerton a lease in good and sufficient form in accordance with the provisions of said agreement to lease, and said lease shall be executed and acknowledged by the said defendants or their successors in interest and thereafter said lease shall be recorded in the manner provided by law in the State of Washington.

* * *

6. Rent accruing after March 25, 1960, is payable to the First Federal Savings and Loan Association of Bremerton, or any subsequent owner of the subject property, in accordance with the terms of the said agreement to lease.

7. Each party shall pay his or its own costs.

Done in Open Court this 5th day of December, 1960.

/s/ WILLIAM J. LINDBERG,
United States District Judge.

Presented and approved by:

/s/ JAMES F. McATEER,
Assistant U. S. Attorney.

Lodged November 9, 1960.

[Endorsed]: Filed and entered December 5, 1960.

[Title of District Court and Cause.]

No. 4959

NOTICE OF APPEAL

Comes now, First Federal Savings and Loan Association of Bremerton, a defendant in the above-entitled action, and does hereby give Notice of Appeal in that certain judgment entered in the above-entitled action on the 5th day of December, 1960, and each and every part thereof that pertains to the rights of the defendant.

It appeals to all and any other part of said judgment which in any way holds the interest of the United States Post Office Department superior to the interest of First Federal Savings and Loan Association of Bremerton, in and to leased premises.

This appeal is taken from the United States District Court of the Western District of Washington, Northern Division, to the United States Circuit Court of Appeals for the Ninth District.

Dated this 3rd day of February, 1961.

/s/ MARION GARLAND,
GARLAND & BISHOP,
Attorneys for Defendant, First Federal Savings & Loan Assn.

[Endorsed]: Filed February 3, 1961.

[Title of District Court and Cause.]

No. 4959

NOTICE OF POSTING CASH BOND

Comes now, the First Federal Savings and Loan Association of Bremerton, and does hereby give Notice of Posting Cash Bond in the sum of two hundred fifty dollars ($250.00) for an appeal in the above-entitled court.

That said cash is hereby posted as a condition to secure the payment of costs if the appeal is dismissed and the judgment affirmed, or of such costs as the appellant court may award if the judgment is modified. This bond to remain in full force and virtue until the final determination of the appeal in the above-entitled matter.

/s/ MARION GARLAND,
GARLAND & BISHOP,
Attorneys for Defendant, First Federal Savings & Loan Assn.

[Endorsed]: Filed Febuary 3, 1961.

In the District Court of the United States, for the Western District of Washington, Northern Division

No. 4959

UNITED STATES OF AMERICA,
Plaintiff,

vs.

EARL L. SANDS, a/k/a E. L. SANDS, et ux., FREDERICK D. HOLBROOK, Trustee in Bankruptcy of James E. Comrada, FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF BREMERTON,
Defendants.

No. 4923

EARL L. SANDS and RITA D. SANDS, Husband and Wife,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

TRANSCRIPT OF TRIAL PROCEEDINGS

* * *

EARL L. SANDS

upon being called as a witness for and on behalf of the plaintiff, and upon being first duly sworn, testified as follows:

Direct Examination

By Mr. McAteer:

Q. State your name and spell your last name.

The Court: Just a moment, please.

(Testimony of Earl L. Sands.)

(Whereupon there was a brief pause.)

The Court: Very well.

A. Earl L. Sands; S-a-n-d-s (spelling).

Q. (By Mr. McAteer): And your residence?

A. Bainbridge Island.

Q. And your occupation? A. Contractor.

Q. Do you have any other occupation?

A. Yes, I am a restaurant operator right now.

Q. When was the last time you actively engaged in the contracting business?

A. During 1956 and 1957. The building of the building on Bainbridge Island was the last.

Q. Are you acquainted with James Comrada?

A. Yes. [15*]

Q. How long have you been acquainted with Mr. Comrada?

A. Oh, I have known of him and him for quite a number of years.

Q. 1950?

A. Oh, prior to that I knew of his family, yes. They come from logging camps where my family originally came from.

Q. Did you ever have any conversation with Comrada concerning a post office at Winslow?

A. Did I have what?

Q. Conversations with Mr. James Comrada.

A. In regards to building it?

Q. In regards to the post office in general?

A. Yes, I have them.

***Page numbering appearing at foot of page of original Reporter's Transcript of Record.**

(Testimony of Earl L. Sands.)

Q. When were those conversations, the earliest date?

A. The earliest date would have been probably in January of 1956.

Q. Did he ever contact you at any time prior to that? A. Not that I recall.

Q. In January of 1956, did Comrada tell you that he had a contract to build a post office on his property at Winslow? A. No.

The Court: He had a contract?

Q. (By Mr. McAteer): That he had a contract to build a post office at Winslow?

A. No, he didn't.

Q. What did he tell you? [16]

A. What did he tell me?

Q. Yes.

A. I don't recall the date but it was during the period of time that he asked me to bid on a building for him that was—I don't remember the exact conversation but it was to be drawn—built to specifications that he would furnish me to bid on.

Q. Did he—what did you—did you tell him that you would submit a bid?

A. Yes, he came over and I made out the bid right there and he brought it back with him.

Q. Is it true that your original estimate of construction cost on the plan shown to you by Comrada was $18,500.00 or $19,000.00?

A. I believe that is correct. I don't have the exact figures.

Q. Is it a fact that Comrada told you he was

(Testimony of Earl L. Sands.)

in danger of losing his agreement with the post office if he couldn't show that construction would be performed by a reputable contractor?

A. Well, I don't recall him telling me that. I know there was quite a bit of pressure on me to get it built. Just what conversation there was about it, I don't know.

Q. Confining your remarks to prior to the time you entered into any written agreement with Comrada.

A. Prior to the time of the writing of it? [17]

Q. Yes. A. Yes, there was.

The Court: There was what?

The Witness: There was talk of losing his bid for a lease.

Q. (By Mr. McAteer): What was the reason for him losing the lease, if you can recall?

A. There was two items.

I believe Number 1, that financially he didn't have the money; and Number 2, that the date of the opening of bids had already passed. That was on a Friday and this, I believe, was just two days prior.

The Court: When did this conversation take place; in January, 1956?

The Witness: Yes.

Q. (By Mr. McAteer): Is it true you agreed to lend your name to Comrada so that the post office would reinstate Comrada's contract?

A. No, it was for the purpose of the bid, or it was to get the bid in. At that time there was quite

(Testimony of Earl L. Sands.)

a bit of controversy going on between Winslow and the village.

Q. Handing you Government's Exhibit 2, what is the bid price? A. The bid price?

Q. Without tax. [18]

A. Without tax, $16,500.00; with tax, [19] $17,500.00.

* * *

Q. Mr. Sands, is it true that you spoke to a postal inspector [20] Wohlfram in September, 1956, and that you told Mr. Wohlfram that the project had been financed to your satisfaction and that you would commence construction within a few days?

A. I don't recall the dates. I have seen Mr. Wohlfram many times but I don't recall the conversation. It has been some time ago.

Q. Subsequent to the execution of Government's Exhibit 2 and prior to the time that any work by yourself had been started on the building?

A. Well, there were several meetings between myself and Earl Wohlfram on Bainbridge Island before actual construction of the building was started but just what that conversation was, I don't recall.

Q. It is a fact that Mr. Wohlfram told you that Comrada had an agreement to lease the property to the post office and that your contract was for construction of that building?

A. That I—that Wohlfram told me there was—that he had a lease?

(Testimony of Earl L. Sands.)

No, there was never anything mentioned of a lease at all. In fact, that is the one thing that they kept pressuring me to build for, was the fact if I didn't get it built—they were pressuring me with the fact if I didn't get it built, they wouldn't——

Q. (Interposing): But they didn't speak about a proposal to lease which was accepted by the post office? [21]

A. I don't know whether it was accepted or not —I know they were speaking of a proposal to lease—nor did I ever see the document. I wouldn't know whether that was what they were referring to or not.

Q. Is it not a fact that after signing Government's Exhibit No. 2, you consulted your attorney, Mr. Jamieson, and he advised you that the informal arrangement between yourself and Mr. Comrada, whereby Comrada or some other person would perform the actual construction, could not—would not protect you and that you were obligated under that contract?

A. I don't remember. I sent to my attorney, yes. I remember that because I figured I needed more than a blank contract that I had here. I had never done any work with the federal government before, or even where they were mixed up in it, and I didn't know what I was doing.

Q. Is it not a fact that in your consultation with your attorney, Mr. Jamieson, that it was decided that the agreement, Government's Exhibit 2, was inadequate to protect yourself and that it

(Testimony of Earl L. Sands.)

would be more appropriate to draw up a more extensive agreement so as to more clearly define your duties and obligations and Mr. Comrada's duties and obligations?

A. I don't recall all the stuff that brought me to go to my attorney but I know it was quite involved and I know it [22] took an attorney to work on it. It was more than just this.

Q. Handing you Government's Exhibit 3, a contract dated May 23, 1956, that is the contract that superseded the original contract, Government's Exhibit 2, is it not?

A. Yes, I believe so. [23]

* * *

Q. Is it not a fact that in July, 1956, you applied for a mortgage loan with the First Federal Savings and Loan Association of Bremerton?

A. I don't recall the date but I did apply for a loan.

Q. Is it not true that when asked by Miss Sprague or Mr. Burmaster of the First Federal Savings and Loan Association whether there was a lease on the property to be mortgaged, you told the prospective mortagee's agent that Comrada was leasing that portion of the property known as the restaurant property but that there was no other lease on the property?

A. That he was leasing the restaurant portion?

Q. Yes.

(Testimony of Earl L. Sands.)

A. And that there was no other lease on any other portion of the property? [27]

Q. Yes.

A. I don't think I even referred to leases. Comrada was still in the building at that time and I had it leased to him.

Q. When you say "building," you mean which building?

A. Which was originally just the restaurant building, the restaurant portion of the building.

Q. And is it a fact that you did not tell the mortgagee that your predecessor in title had entered into a proposal to lease agreement with the Post Office Department or any details concerning your knowledge of Comrada's agreement with the post office?

A. I had no knowledge of his agreement with the post office; therefore I couldn't have related anything to them.

Q. You did not tell the bank that this post office was being built pursuant to a proposal to lease agreement with the post office?

A. I think it was quite well known that there was a proposal to lease but I didn't tell them that there was a lease. There is no lease.

Q. It is a fact that you did not even mention to the bank that there was a proposal to lease?

A. Well, I don't recall whether I did or not, to tell you the truth. It has been quite a number of years ago and I don't even recall the conversation with the bank other than to make the loan.

(Testimony of Earl L. Sands.)

and in making the loan they go out [28] and investigate and if the loan goes through, it goes through.

Q. At the time of accepting the deed from Comrada, Government's Exhibit 4, dated May 23, 1956, did you inquire of Comrada or ask Comrada to show you his proposal to lease agreement?

A. At that particular time I don't recall whether I did or not. I could have. However, I doubt very much I did, otherwise he might have—no, I don't think I did because I wasn't concerned at that time with what his dealings with the Postal Department were. However, like I say, I could have asked him but I doubt that I did because it was actually no concern of mine. [29]

* * *

Q. Prior to that date had you discussed with Mr. Comrada any terms about a bid to lease or anything of the sort that he had with the United States Post Office?

A. Not for a bid to lease. For specifications, I thought you were referring to. I was after specifications to go along with this set of plans but not so far as his business he had with the [31] government.

Q. And did he—then he never informed you at any time of any binding agreement he had with the government? A. No.

Q. But your understanding was that this building was being built for use by the government, wasn't it?

A. Yes, that was my understanding. [32]

(Testimony of Earl L. Sands.)

* * *

A. I don't recall any of a proposal—recall any lease.

Q. Now, when you were conferring at the bank and applying for a loan you say you don't remember whether you said anything to the bank about a proposal to lease; do you recall whether or not that matter ever came up?

A. Whether the matter of proposal to lease came up at the bank?

Q. Yes. A. No, I don't think so.

Q. But you definitely told the bank that there was no lease?

A. Yes, that there would be no lease unless I completed the building and then—unless Jim Comrada completed the [36] building.

* * *

Redirect Examination

By Mr. McAteer: [37]

* * *

Q. You knew there were other documents relating to the property which Comrada had which he did not disclose to you prior to May 23, 1956?

A. Well, I wouldn't say I knew there was other documents. I knew there was something more than what I had here to build on.

Q. And yet you accepted the deed without first taking a look at those other documents?

(Testimony of Earl L. Sands.)

A. I just about had to with Earl Wohlfram pushing me all the [38] time and Comrada pushing me. I had all that I had tied up in it and I had no choice but to keep going. [39]

* * *

A. Comrada had done a lot of work on that property as a bowling alley but never as a post office. You see, that was all laid out and had footing forms in it for a bowling alley which I had to take out. Whether Comrada did that himself, I don't know. That was prior to my entering into this agreement.

Q. (By Mr. McAteer): In your best judgment as a contractor, how many months or years prior to the time that you started construction work were these footing forms in place?

A. Oh, quite a number of years I would say. The approximate year I couldn't possibly know but they were in there quite a number of years.

Q. When you made application for the loan at the First Federal Savings and Loan Association of Bremerton, was I correct when I heard you say, in response to a question by Mr. Jamieson, that you told the bank that unless Jim Comrada could complete the building there would be no lease?

A. Like I say, I don't recall that conversation at all, just exactly what took place at the bank. However, taking it from a standpoint of not knowing myself what he was doing, I couldn't very well elaborate on it.

(Testimony of Earl L. Sands.)

Q. Did you discuss with the bank under what arrangement the [40] post office would occupy the building when completed?

A. No, I don't believe so. [41]

* * *

JOHN L. VAN BUSKIRK

upon being called as a witness for and on behalf of the plaintiff and upon being first duly sworn, testified as follows:

Direct Examination

* * *

A. I am the regional real estate manager for the post office department.

Q. When you speak of a region, how many states or what area is included within that area?

A. There are fifteen regions for the post office department [43] across the country and we have the fifteenth region which is Washington, Oregon, Idaho, Montana and Alaska.

Q. How many post office facilities are under your jurisdiction?

A. There are approximately just under two thousand post offices of which approximately between twelve and thirteen hundred of them are rented quarters that are under our control—under my control.

Q. By "rented quarters" you mean first, second and third class post offices?

A. That would be right.

Q. And what are fourth class post offices?

(Testimony of John L. Van Buskirk.)

A. Fourth class post offices are small ones in which the postmaster is given an arrangement in his salary to make his own arrangements. It may be in a drug store or a grocery store and tied in with other businesses in a smaller community.

Q. What is the nature of the post office department's property interests in the twelve or thirteen hundred first, second and third class post offices?

A. They are all occupied on either a leased basis or a month by month rental contract arrangement except in the federal buildings and there are approximately one hundred fifteen of those.

Q. So, over one thousand of them are occupied on a lease or [44] rental basis?

A. That is correct.

Q. What are the activities and functions of a regional real estate manager?

A. Well, as regional real estate manager we have complete charge for the securing and maintenance and the operation of the post office department in any area that has a second—first, second and third class post office. [45]

* * *

Q. Are any members of your staff trained lawyers? A. No, sir.

Q. How do you secure the legal advice necessary for the operation of a regional real estate office?

A. When we have legal problems they are forwarded to the post office department in Washington, D.C., where they are transmitted to the general

(Testimony of John L. Van Buskirk.)

counsel for decision and then they come back through the bureau facilities in Washington and to me for a final decision.

Q. Then, except for minor matters where you may contact the local United States attorney, you refer problems on post office policy to the post office department? A. That is correct.

Q. What activates you in securing new post office facilities?

A. Usually the activating force to get a new—to get a building under way would be an expiring lease or having outgrown our old quarters. Either situation would require that we do something about providing new and larger quarters.

Q. When a need for a new facility is decided upon, is there [46] an established procedure for securing new facilities? A. Yes, sir.

Q. What is that procedure?

A. We have—our operating people furnish us with the size of the site that is required and the size of the building that is required and our next step then is to go into the area and analyze just exactly what might be available and what our best course of procedure might be.

Q. What, in general, are the two typical procedures?

A. We have—our lease procedure pretty much set up is that the preferred way of operating is to get an assignable option on a desirable and suitable site. However, oftentimes there are occasions when perhaps there are other vacant buildings in the

(Testimony of John L. Van Buskirk.)

community or that there may be several very desirable locations and, perhaps, the most desirable not available on a practical site. We would then go to bids, or call for bids, letting anyone that had a site present to us a proposal to lease a building, go in and lease to us on an open procedure.

Q. What procedure was followed in the Winslow situation?

A. The open procedure of going to bid, that requirement that would let the bidder present the proposal to us on their site and on our general layout of the building. [47]

* * *

Q. How are bids called for?

A. When we go to bids for the construction, or for a new unit, we post a notice in the post office and we have a bidder list and we alert the postmaster to what we are doing and have him active in the community in which it is coming out so that anyone he knows or thinks might be interested in producing either an investor or a contractor [69] for the building to have him contact the postmaster and the next step is to start out with a rough drawing or what we call a schematic that gives the general outline of the building and the particulars inside as to what partitions may be necessary and toilet facilities and doors and all the important factors that are important to the post office are outlined in this.

This together with all the forms necessary to prepare a bid and a letter of instruction is sent to every

(Testimony of John L. Van Buskirk.)
interested investor or contractor that might want to bid.

Out of that we set up an opening date and on that date, why, all the bids we have received are analyzed and if there is an acceptable bid an award is made over a period after that opening.

Q. Do you have knowledge of whether or not that procedure was followed in the Winslow case?

A. To the best of my knowledge and belief, it was.

Q. How many bids were received, if you know?

A. As I recall there were eight.

Q. And Form 1400 proposals, which is the form upon which government's Exhibit 1 is submitted, are required by post office regulations to be in acknowledged form when submitted?

A. This proposal to lease quarters—in this case 1400, and we still call it that—is a standard form that we [70] use in all our leasing procedures and it is not acknowledged before a Notary Public.

Q. It is not acknowledged in a procedure in your region; nor in any other region?

A. Nor in any other region.

Mr. Jamieson: I object.

The Court: I don't know whether he has knowledge. Is that the basis?

Mr. Jamieson: Yes.

Q. (By Mr. McAteer): Do you have knowledge whether or not the form 1400 is used in other parts of the United States, other fourteen regions?

A. All fifteen regions use the same procedure

(Testimony of John L. Van Buskirk.)

and the same forms and in the other fourteen regions they do as we do it here; it comes to us as a bid without being acknowledged.

Q. Are you familiar with the number of proposals accepted by the post office department to lease space in newly constructed facilities during the last several years?

A. Yes, sir, I have that tabulation.

Q. How many such proposals were accepted in the years 1953 and 1954 and subsequent years?

The Court: In what area are you speaking of, Mr. McAteer? [71]

* * *

"Can you state in round numbers your best estimate of the number of such proposals that were accepted by the post office department in representative years during the past five or six years?"

A. Well, going back to 1953, 1954, 1955 era, it was approximately something in excess of three hundred buildings a year, brand new buildings, put in existence.

From 1955, 1956 and 1957, it built up until in 1958, and I am speaking of fiscal years, and 1959, I believe we had approximately six hundred each year, brand new buildings and that was almost doubled this past year with new buildings.

Now, I am speaking principally of brand new buildings built to our plans and specifications and accepted on our standard agreement to lease procedure. [80]

Q. (By Mr. McAteer): Generally that proce-

(Testimony of John L. Van Buskirk.)

dure would be identical with the procedure used in the Winslow case?

A. Except that some of our larger buildings, of course, take a fourteen hundred and expand it to cover a larger facility and more complicated construction and other pertinent information.

Q. In your own region can you state in round numbers your best recollection of how many such proposals have been accepted over recent years?

A. Well, we started in and have pretty much built up a program here of increased production along with the over-all pattern. Our earlier period of time there we did not have so many. I believe it was comparatively few, some place between twenty and thirty a year until there came a time, and I believe it was in 1957, that we converted from having postal inspectors do our field work to real estate men and we had a lull. I believe we had a total of ten and after they got onto their procedures and started building up we got into a greater volume of business. There was something around sixty buildings in the four states that we have produced in the fiscal year ending June 30, 1960. That was in the 1960 fiscal period.

Q. What new major facilities are under construction in your region at the present time? [81]

A. Well, I believe that we have quite a few of them under construction.

* * *

(Testimony of John L. Van Buskirk.)

Q. (By Mr. McAteer): For example, is there a new facility in Portland, Oregon?

A. Yes, our new Portland major facility was accepted late in June. That is one of the largest buildings in the northwest, something in excess of three hundred sixty-five thousand square feet. There was a total investment of [82] approximately ten million dollars and that doesn't contain the automation and the mechanism that is going into it.

The Court: I think that is another matter.

Q. (By Mr. McAteer): Can you state how the bid was made up and awarded in that case?

A. Bid packets were made up and mailed out to all interested parties and the bids resulted in our getting, I think, eight bids for that major facility. All of those bids, of course, were transferred back to the department.

Q. Were the bids required to be acknowledged?

A. No, sir, there was no proposal to lease quarters acknowledged amongst the bids.

Q. Are you acquainted with the procedure that was used in the developing of the bids and making of awards for the terminal annex in Seattle, Washington, on Fourth Avenue and Third Avenue South?

A. Briefly.

Q. Was the same fourteen hundred bid procedure used in that case?

A. Yes, indeed. There was a proposal to lease quarters that came to us. It was opened in Washington and it was an unacknowledged instrument.

Q. Form 1400, the proposal to lease quarters or

(Testimony of John L. Van Buskirk.)

agreement to lease, provides for the execution of a formal lease at a [83] later time; could you explain to the court when such a formal lease is executed?

A. The proposal is accepted by the post office department and the bidder is made an award of his proposal. He constructs the building and at one of two points the lease is executed, either upon completion of the building, or the moving into the building of the post office department.

* * *

Q. (Continuing): Where the building is built in accordance with an accepted proposal to lease quarters, without substantial change, are the terms of the formal lease always in accord with the accepted proposal to lease, accepted proposals to lease quarters? A. It must be.

Q. The proposal to lease quarters then is a final agreement?

A. The proposal to lease quarters is a definite agreement between a bidder and the post office department that results in a lease being executed under the terms and conditions of the proposal to lease.

Mr. Jamieson: Your Honor, I move to strike the answer of the witness as being a conclusion of law and not a matter of fact.

The Court: Well, insofar as it is a conclusion of law I will disregard it. [85]

* * *

(Testimony of John L. Van Buskirk.)

Q. Is it the practice of the post office department to incorporate into the final lease the same terms as to duration and of a dollar amount of rent as was provided in the accepted proposal?

A. That is correct. [86]

* * *

Cross-Examination

By Mr. Jamieson:

Q. Mr. Van Buskirk, referring to this Form 1400 which I believe is marked as the government's exhibit—plaintiff's Exhibit No. 1—it contains several portions here and I notice here the first page says "Proposal to Lease Quarters" and the second page is page 2 of Form 1400 and then here is "Information for Proponent" and then here is a letter.

This letter is to the Postmaster General from James E. Comrada and Florence Comrada.

This is not part of the Form 1400, is it?

A. This is an amendment, a letter amendment to the 1400 proposal to lease quarters.

Q. I see, and does the 1400 also include a sample lease, is that correct? [87]

A. On the back of the 1400 is a sample lease, yes, sir.

Q. And it is customary that the government does not sign—is it customary then that the bidder should sign the sample lease?

(Testimony of John L. Van Buskirk.)

A. No, not necessarily the sample lease. He signs the proposal to us. There have been many instances when the bidder has acknowledged reading the lease by signing it, but that is actually not making a proposal to us. The proposal to lease quarters should be signed as offering us a proposal.

Q. And it is contemplated then, is it not, that a lease would be signed by the parties upon completion of the building, is that it?

A. The lease is executed upon the completion of the building and the acceptance by the post office department of the building as being completed.

Q. So that the Form 1400 is not the complete transaction to occur between the parties, is it?

A. It is a complete transaction to create the building into existence prior to the execution. It is an agreement to lease to the department. It is a contractual arrangement.

Q. Now, under this proposal to lease quarters, which is Government's Exhibit No. 1, I believe it says here on this one part—it says, "* * * no additional items included * * *" in this letter or the amendment. "* * * at a rental of [88] one thousand five hundred dollars per annum, no additional items included * * *"

What does "no additional items included" mean?

A. No substantial change in the building.

Q. No substantial change in the building?

A. In respect to this proposal to change it from a ten to fifteen year proposal. I mean the change of

(Testimony of John L. Van Buskirk.)

the terms and rent only is the intent of this letter of amendment.

Q. Then when it reads "* * * ten years from date of completion of the building, at a rental of one thousand five hundred dollars per annum, no additional items included * * *" that doesn't have any reference——

A. (Interposing): I beg your pardon, this has reference to the quarters, light, heat and so on.

In other words, Mr.—(pause)—filled out the forms satisfactorily, fuel, heat, light, and it means no other items of that kind are included.

Q. It wouldn't have reference to the fact that if the government wished a change or modification in the plans that the lease not be effective?

A. No, sir, it has no such inference at all.

The amendment to this proposal—the proposal came to us for a ten-year period at fifteen hundred dollars a year. For various reasons it was changed to a fifteen-year proposal with the rental adjusted to fourteen hundred [89] and eighty dollars, I believe, and it was a matter of assisting Mr. Comrada in getting financing but there was no change in the general terms and conditions of any of the proposal except for the term and the adjustment in the rent, which, as a matter of fact, adds out for the twenty-year period as being identical.

Q. Well, now, this proposal to lease quarters does not include all the specifications, does it?

A. Sometimes there are other specifications be-

(Testimony of John L. Van Buskirk.)

yond what come in to the—through this 1400. Oftentimes we have a schematic that shows the general layout of the building and the size of a site we want and it would stipulate many of the important facets. Of course, the schematic or rough drawing—I say "rough," it is rough only in that it does not fill in the details but it gives the facts pertinent to the post office department in the construction of the building such as tile on the floor and acoustical ceilings, whether or not a wainscoating is installed or painted on, and all those pertinent facts that would relate to the type and quality of the building.

Q. And the person who makes a bid which, if accepted by the government, is only expected then to provide the number of square footage of space provided for in this proposal, is that correct?

A. The general program is one providing that amount of space [90] plus the other specific requirements, specifications that are called for.

Q. So that there could have been other specific specifications then besides what is in this Form 1400 here as stated, being the proposal to lease quarters that was made out with Mr. Comrada in this particular instance?

A. It is possible; it is possible.

Q. Where are the details then supposed to be obtained if not here?

A. They would be furnished to Mr. Comrada in this particular packet that is put out when he indicated an interest in providing the quarters at Winslow.

(Testimony of John L. Van Buskirk.)

In other words, Mr. Jamieson, we don't expect any more than we ask for in furnishing the information that comes to us in the bid packet and we expect the proposal that we get to fulfill all the obligations and requirements of that called for bid that comes to the bidder in a bid packet.

Q. And that is why you make reference to the number of square feet and the size of the building and so forth?

A. That part of it, yes.

Q. Now, subsequent to the completion of a building then, you say that the lease is executed either upon completion or upon moving in by the government, is that correct?

A. The lease is drawn at the time the building is about to be [91] completed, about to be moved into, and is executed at the time it is accepted, inspected and acceptable to the post office department.

Q. Now, you mentioned several buildings since 1953, new buildings, that have been built and proposals to lease that have been accepted by the government when the actual lease was executed. Is it not true that several of them were acknowledged by the lessor?

A. The leases are always acknowledged. It is one of the requirements of the post office department that the lease itself be acknowledged and recorded by the lessor.

Q. Well, now, these proposals to lease don't actually state when the rent is to be paid, do they?

A. They state that it will be on or about a cer-

(Testimony of John L. Van Buskirk.)

tain date, so many days after acceptance of the proposal. There is an area in there of adjustment for the reason that materials and labor supplies and many things would enter into an actual saying of you are going to occupy the building on the 15th day of September and give any one ninety or one hundred eighty days to do it. It is almost impossible to have it to the minute so that there is a leeway in there but there are approximate dates.

Q. There is nothing in the proposal to show whether the rent be paid in advance or otherwise, is there?

A. In the back of your proposal there, Mr. Jamieson, you will [92] find a sample lease and on the sample lease I believe that it says it will be paid monthly.

Q. And it is true, is it, that when the government has the lease executed they require that the lease be acknowledged in the State of Washington?

A. All leases in all fifty states have to be acknowledged and recorded by the bidder or the lessor, or the owner of the premises.

The Court: Is that by virtue of some regulation or do you know?

The Witness: Your Honor, it is a definite policy that it has to be done and whether it is by the Postmaster General's decree or by law, I am not prepared to say.

Q. (By Mr. Jamieson): And it is also a requirement that both husband and wife must join in the proposal, is that correct?

(Testimony of John L. Van Buskirk.)

A. A husband and wife both join in the proposal and join in executing the lease.

Q. If it is required by state law?

A. It is required by the post office department for the same people who offer us the proposal to also execute the lease and by the same token there is also a requirement that husband and wife both execute an agreement to lease and also a lease unless there is a special exception. In [93] other words, if it were you, Mr. Jamieson, dealing with your own separate property and you present your proposal on that basis, it would be acceptable provided it was sufficiently shown that it was your separate property rather than community property.

Q. Doesn't it provide in the lease proposal in states where required by law, wives must join their husbands and vice versa?

A. We make, in addition to that, the procedure of going right on through with both parties.

Q. So, when the Seattle terminal annex was completed, an acknowledged lease was entered into by the parties, is that correct?

A. The Seattle terminal annex was completed and the lease executed and that was acknowledged and recorded. I might make one comment there. The recorded lease on the terminal annex was a short form acknowledgment. I mean by that, it was a recorded instrument that referred to the lease that was executed. Actually, the lease itself was not recorded insofar as the terminal annex.

Q. Now, referring to Government's Exhibit No. 1, proposal to lease quarters, assuming that sub-

(Testimony of John L. Van Buskirk.)

stantial changes in the property which would increase the cost of building and so forth had been required by the Government, the Government could not expect this proposed lease to be binding, [94] could they?

A. The instructions they are given are that no changes will be made without written authority and a definite authority of any changes that are to be made that would affect any change in rent.

* * *

Q. (By Mr. Jamieson, continuing): You informed us about the brand new buildings that have been built and I am asking you how many of them—do you have any knowledge of how many of these buildings are occupied by the government without any written lease agreement or by month to month basis?

A. I don't know whether I understand your question exactly, Mr. Jamieson, but we cannot occupy any building without written documents for our occupying the building. [95]

* * *

The Court: Mr. Garland has asked another question of his witness. This witness has no knowledge as to whether or not an original signed copy was delivered to Mr. Comrada. That is the question.

Mr. Jamieson: The question is still material?

The Court: At least I haven't ruled it otherwise.

(Testimony of John L. Van Buskirk.)

Mr. Jamieson: And his answer was that he had no knowledge?

The Court: That he had no knowledge.

Q. (By Mr. Garland): Now, in July of 1957, up until July, 1957, for the year 1955—I think you took until 1957, 1953 until 1957—[105] how many post offices were constructed under proposal to lease such as Exhibit 1 in Kitsap and Mason Counties, the great peninsula?

A. I will have to check my records in Portland to give you an answer to that.

Q. Do you know whether there were many or not? A. I cannot answer definitely.

Q. I believe you said in the year 1957 there were twenty post offices that were constructed in five states?

A. That was in 1957. There were approximately ten or thereabouts.

Q. Ten? A. Ten.

Q. Ten constructed in five states?

A. In 1957 and the reason I gave was because we were——

Q. (Interposing): Of those ten constructed in the five states in 1957, how many of those were constructed before July?

A. Well, that would be up until July.

Q. Up until July, 1957? A. Yes.

Q. And what particular part of the State of Washington were any of those constructed in?

A. It would be difficult for me to answer that.

(Testimony of John L. Van Buskirk.)

Q. Do you know if any were constructed in the State of Washington? [106]

A. In 1957 I am sure there were but to put my finger on one, it would be difficult to do.

Mr. McAteer: Your Honor, if counsel will be willing to withdraw the previous objection to Exhibit 23, I think the details and statistics would be available.

Q. (By Mr. Garland): Now, you stated you had no occupancies that weren't under lease in the year 1957, where the rental was more than one thousand dollars a year, is that correct?

A. State that question again.

Q. You said you had no rentals in the year 1957 except where it was under lease where the rent was more than one thousand dollars a year?

A. In all of our facilities, and if it is a technical question you are asking me, and interim period—that is one thing, but under a policy of the post office department, that we adhere to, we would not enter into or move into a building of any kind without a definite written understanding of occupancy that would result in a lease if the rental was over one thousand dollars.

Q. Now, what quarters at Winslow did you occupy immediately before you occupied this building which was built pursuant to a proposal to lease which is Exhibit 1?

A. We rented temporary quarters because we forced out of the former post office. [107]

Q. Wasn't that a month to month rental?

(Testimony of John L. Van Buskirk.)

A. That was an emergency arrangement.

The Court: The question was whether it was month to month.

Q. (By Mr. Garland): Well, but it was a month to month rental?

A. If I recall that situation right, it was on a Form 33 which was an emergency use of space. I am pulling that out of the back of my head, sir.

Q. Is a Form 33 a month to month rental?

A. This Form 33 is an arrangement where the post office department can take care of an emergency situation for temporary quarters and many other things for a short period of time.

Q. To refresh your recollection, you did have such a rental before you—immediately before you moved into this building such that you could move out at any time you wished, didn't you?

A. If that was the situation—I do know we were in temporary quarters—it was an emergency situation and we have a provision for such emergencies as that on what we call a Form 33 and I believe it was handled that way.

Q. Now, before the lease is signed officially by your department, it is obligated to pay rent or go ahead on the premises? [108]

A. We pay rent many times under an accepted agreement to lease.

Q. But now, you made the statement that "we require the signature of both the husband and wife and we require that a lease be entered into." Do

(Testimony of John L. Van Buskirk.)

you have any rules or regulations which state what happens if they refuse to enter into a formal lease?

A. That becomes a legal problem you would send back to general counsel.

Q. You have no rules or regulations covering that?

A. There is no set policy on that. We have had very little experience in that category.

Q. Who, in July of 1957, that was in Seattle or Winslow, would have known of the claim of the United States Government that they might have had a lease; who could inquiry have been made to in the local area?

A. I am sure the postmaster would have been informed.

Q. The postmaster where?

A. That particular community. He is given a copy of all the records, all documents pertaining to properties under his control.

The Court: You mean in this case the postmaster at Winslow?

The Witness: That is right; at that time there was a postmaster at Winslow. [109]

Mr. Garland: I have no other questions.

The Court: Can you expand a little further? I don't suppose you can testify what someone else knew, but under the custom and practice of the post office department, what would the local postmaster, such as at Winslow, know of the transaction?

(Testimony of John L. Van Buskirk.)

The Witness: He would be furnished with all copies of documents relating to his quarters.

The Court: Which would include what?

The Witness: A copy of Form 1400 until there was a lease and when the lease was executed he would receive a copy of that.

The Court: Was there a postmaster at Winslow during 1955, 1956 and 1957?

The Witness: I believe so. [110]

* * *

Cross-Examination

By Mr. Jamieson:

Q. Assuming the postmaster at a local office such as Winslow had this information, is he authorized by the department to give this information out?

A. I don't believe there is any reason why it should be withheld. Anyone inquiring as to the status of any of the business of that kind, I am sure that he would be able to get that kind of information from the postmaster.

* * *

Redirect Examination

By Mr. McAteer:

Q. Calling your attention to the section of Exhibit 1 entitled "Information for Proponents," does that page give details as to the explanation of the terms of the Form 1400 and of other details relating to the proposed lease arrangement?

(Testimony of John L. Van Buskirk.)

A. I believe that this information for proponents pretty much covers the terms and conditions of the progress of the development of the building and the eventualities of it.

Mr. McAteer: I would like to read a portion of that, your Honor. Paragraph 7 on that page reads as follows: [111]

"Leases must be recorded at the expense of the lessor."

That is the portion that I wanted to call to the court's attention and call to the witness' attenion.

Q. (By Mr. McAteer): Is it your testimony that the formal leases that are entered into after the acceptance of the property by the post office must be acknowledged, generally referring to the fact that those leases are recorded under normal state procedure?

A. They are recorded. I don't understand what you mean by "state procedure." They are recorded as a matter of requirement of the post office department by the Clerk in the County in which the facility is built.

Q. They are recorded under a State recording system and not any so-called federal recording system?

A. No special system. It is whatever county or state facilities there are for making the lease a matter of record for anyone to consider insofar as the title to the property is concerned, yes.

Q. Then, if local law permitted the filing or re-

(Testimony of John L. Van Buskirk.)

cording of a lease without acknowledgment, that would be sufficient?

A. No, sir, our instructions are still to execute a lease by the parties that make us the proposal, or subsequent owners, and to have their signatures acknowledged and to [112] have it recorded in the county in which the facility is located.

Q. That is a uniform practice?

A. That is a uniform practice.

Q. Such practice is not, however, required for the proposal to lease, 1400?

A. No, sir, that is not a recorded instrument.

* * *

Recross Examination

By Mr. Garland:

Q. Did the post office department know at the time they took occupancy of the building that there was a mortgage against it in favor of the First Federal Savings and Loan Association?

Mr. McAteer: It is covered in the pre-trial order, your Honor.

A. I believe it is a matter of——

The Court (Interposing): What part?

Do you want to answer the question?

A. (Continuing): I believe there was knowledge at the time, it was known at the time. I am not positive of the date [113] in there. [114]

* * *

EARL A. WOHLFROM

upon being called as a witness for and on behalf of the plaintiff, and upon being first duly sworn, testified as follows:

The Clerk: Will you state your full name and spell your last name, please?

The Witness: Earl A. Wohlfrom, W-o-h-l-f-r-o-m (spelling).

Direct Examination

By Mr. McAteer:

Q. Mr. Wohlfrom, will you state your residence?

A. Seattle, Washington.

Q. Your street address?

A. 3836-46th Avenue Northeast.

Q. Your occupation? A. I am retired.

Q. From what occupation are you retired?

A. As a postal inspector.

Q. When were you retired?

A. June 30, 1957.

Q. How many years did you work for the post office department?

A. Forty-seven years and a few months and days.

Q. What department of the post office were you principally engaged with? [129]

A. Well, I was in the inspection service. [130]

* * *

Q. (By Mr. McAteer, continuing): Mr. Wohlfrom, do you have any knowledge of whether or not information would have been available to a person

(Testimony of Earl A. Wohlfrom.)

making inquiry at the post office, in Seattle, Washington, concerning the nature of the post office's interests in the building under construction on James Comrada's property at Winslow, Washington, during the year 1956?

A. Well, information would always be available in my office, yes.

The Court: To anyone who might make inquiry, to any member of the public?

The Witness: No, to interested parties, yes, sir.

Q. (By Mr. McAteer): By "interested parties," a person who could establish some [133] basis for——

Mr. Garland (Interposing): I object to the leading question. If he wants to ask who are the interested parties, fine, but to tell him who they are—I think this witness should testify.

Q. (By Mr. McAteer, continuing): What was the post office—who would the post office consider an interested bidder to whom the information would be available?

A. Well, the successful bidder would be the one who would be entitled to all that information.

Q. Would any other parties be entitled to the information, such as a banker? [134]

A. If he had an interest or was interested in that property it would be available to him. That is, in the manner of financing of it, I understand you to say.

Q. Then it would be correct to say that if a banker or a person from any other financial institu-

(Testimony of Earl A. Wohlfrom.)

tion who was contemplating entering into a transaction affecting that property, and inquiring about the post office's interest in that property, would that person be interested—an interested party, and be entitled to that information? A. Yes, sir.

Q. Do you know—state whether or not you know if similar information was also available locally at Winslow, Washington?

A. No, I don't believe it would be.

Q. Would the local postmaster have any information?

A. He would have some information, but the local postmaster would refer any inquiries to him probably to the inspector handling the case.

Q. The inspection service at the primary responsibility for the handling of leases?

A. Yes, sir.

Q. In your contact with Mr. Sands in the construction of the building, did you make available to Mr. Sands such information as he requested?

A. That is right. [135]

Mr. McAteer: Mr. Jamieson, you may inquire.

Cross-Examination

By Mr. Jamieson:

Q. You don't know as a matter of fact, do you, Mr. Wohlfram, actually, about the delivery of the instruments?

When you were referring to the delivery you said, I believe, you get one copy, is it?

(Testimony of Earl A. Wohlfrom.)

A. Yes, sir.

Q. That is the usual procedure?

A. That is right.

Q. But you couldn't say as a matter of fact that in this particular instance it was done; you don't know of your own knowledge, do you?

A. I received a copy.

Q. You received a copy? A. Oh, yes.

Q. But you don't know about the other copies?

A. I wouldn't know. That is the postmaster's responsibility to deliver that.

The Court: The postmaster, the local postmaster?

The Witness: The local postmaster. He delivers it and obtains the bidder's signature which is returned to the department.

Q. (By Mr. Jamieson): Now, when you talk about interested parties, [136] you mean if any bank should come to you and say they were interested in financing, that you would give them the true information as regards this?

A. I would if I was satisfied that they were an interested party. In other words, just a casual inquiry by some financial institution, I would want to be certain first before giving any information that they were actually interested. That would be done normally through contact with a successful bidder.

Q. And so in general then the information, so far as the post office policy is concerned, is that this information belongs to the successful bidder?

(Testimony of Earl A. Wohlfrom.)

A. Yes, sir.

Q. And not anyone else unless the successful bidder says they should have the information?

A. That is right.

Q. So in your dealings then with Mr. Sands you felt he should get all this information from Mr. Comrada, the successful bidder, is that right?

A. Well, yes. Mr. Sands was the contractor and he was entitled to such information as he needed.

Q. Now, you said that the building at Winslow was substantially completed in accordance with these plans, is that correct?

A. That is right. [137]

* * *

Cross-Examination

By Mr. Garland:

Q. How soon after you started dealings with Mr. Comrada did you realize he would need financing?

A. Well, I couldn't say other than I knew that the start of construction was being delayed, and there must have been—it must have been over a couple of months, maybe, and nothing had been done, and then I began to get a little concerned about it.

Q. Did you at that time inquire of Mr. Comrada what the delay [148] was and did he tell you it was financing? A. That is right.

Q. And you knew he would need outside financing for the building even before construction was begun, didn't you?

(Testimony of Earl A. Wohlfrom.)

A. Well, I learned that after his proposal was accepted. He gave me to understand that he was amply financed for the construction of the building.

Q. But before the ground was broken for the construction you then learned he was mistaken?

A. That is right.

Q. And that he would need outside financing?

A. That is right.

Mr. Garland: I have no other questions.

Redirect Examination

By Mr. McAteer: [149]

* * *

Q. You said in answer to a question by Mr. Jamieson that an interested party would include a person who was designated by the successful bidder, such as a bank or financial institution who was designated by the successful bidder.

A. As his legal representative, yes, he would be entitled to the information—or agent.

Q. Would that also include a bank who was—had received an [150] application for a loan from the successful bidder? A. Yes, sir.

Q. And also would include a person who had made application for a loan being a successor, that is, one who received a deed from the successful bidder, the successful bidder having sold out?

A. Yes, sir.

* * *

(Testimony of Earl A. Wohlfrom.)

Recross-Examination

By Mr. Garland:

Q. You still maintain your previous statement, however, you would expect the financier to get his information either from the successful bidder or the assignee of the successful bidder?

As I understood your testimony, you said you would expect inquiry to come from the person who had received the bid, or one who stood in his place, so far as the [151] financier?

As I understood your testimony in chief, you said that you would expect inquiry to come from the person who had received the bid, or one who stood in his place, so far as the financier was concerned, and I took it from that to mean that if somebody came to you to see about financing the place you would have expected him to have been seen by the bidder?

A. Well, I would say that ordinarily I would know that the successful bidder had informed me he was negotiating a loan with a certain institution and if that institution then asked me for information, I would give it to them.

Q. And you would expect that to originate—before you had authority to give that information out to have originated from the bidder himself?

A. That is right.

(Testimony of Earl A. Wohlfrom.)

Further Redirect Examination

By Mr. McAteer:

Q. Mr. Wohlfram, assuming that the successful bidder had contracted to have the property built by a contractor, and assuming that the contractor had acquired a deed to the property from the successful bidder as security for the cost of construction, but prior to the time that the contractor told you of the deed or that the contractor [152] went to an institution and applied for a loan, if that financial institution inquired of the post office that they had been advised that a post office building was under construction on a certain piece of property and that they desired information whether or not the post office had any documents or any other interests that would—that related to that property, would such information be available to the agent from the financial institution? [153]

* * *

A. Yes, sir, it would. [154]

* * *

EMILY A. SPRAGUE

upon being called as a witness for and upon behalf of the defendant, testified as follows:

The Clerk: Will you state your full name and spell your last name, please?

The Witness: Emily A. Sprague, S-p-r-a-g-u-e.

Direct Examination

By Mr. Garland:

Q. What is your name, please?

A. Emily A. Sprague.

Q. Where do you live, Mrs. Sprague?

A. 958 Silverdale, Bremerton.

Q. And what do you do for a living?

A. I work with the First Federal Savings and Loan Association. I am the assistant secretary and also the loan secretary of the organization.

Q. And what position did you hold with that company on July 25, 1956?

A. I was the assistant secretary and the loan secretary. [160]

* * *

Q. Did the processing that you did have anything to do with title insurance?

A. Yes, sir.

Q. And what did you do?

A. After the loan application was approved I ordered out what we call an ATA title insurance from one of the local title companies.

Q. Did you make a loan in July, 1956, to Mr. Sands? A. We did.

(Testimony of Emily A. Sprague.)

Q. In that particular case did you get a loan policy? A. Yes.

Q. Did that policy have any information concerning an interest of the government in the property on which you made the loan? [161]

* * *

A. It did not.

Q. (By Mr. Garland): Did your record show what type of structure was being built on the premises at the time you made the loan?

A. It showed that a building was being put up that could be used for a business building or the use of a post office or any commercial building.

Q. And during the—did you receive—have you made—you made a loan at that time, your institution? A. That is right.

Q. And what was the amount of that loan?

A. $21,000.00.

Q. And what since happened to that?

A. We have since foreclosed the mortgage and received our [162] certificate, sheriff's certificate of sale subject to retention.

Q. And the date of that certificate of sale?

A. March 25, 1960.

Q. And since March 25, 1960, who has been in possession of the premises?

A. Mr. Sands has been in possession of the one portion and the post office has been in possession of the other portion.

(Testimony of Emily A. Sprague.)

Q. Have you received any rental for the portion that is in the possession of the post office?

A. No, sir.

Q. Have you received any tender of rental?

A. No, sir.

Q. Have you made a demand for rental?

A. Yes.

Q. And how much did you demand?

A. $330.00 a month.

The Court: What was that last question?

(Whereupon, the following was read by the reporter:)

"Question: And how much did you demand?

"Answer: $330.00."

Q. (By Mr. Garland): Did you receive any counter-proposal of any kind?

A. No, sir. [163]

Q. At the time you made the loan on the premises did it show whether or not there was any occupancy of the premises?

A. There was no occupancy on the portion of the new construction.

Q. Which is now occupied by?

A. By the post office.

The Court: Did you observe it yourself?

The Witness: No, sir. The title company and our president——

The Court: I think there is an exhibit on that, isn't there?

Mr. Garland: There is an exhibit on that, and

(Testimony of Emily A. Sprague.)

it is also in the admitted statement of facts. However, in the appended facts I also brought it out again, but it is admitted there was no occupancy at the time they made the loan.

The Court: I understood the inspection was made by someone other than the witness, and I didn't know whether she was qualified to testify to that unless she observed it herself.

Q. (By Mr. Garland): The record showed that?

A. Yes, sir.

Q. What did they show as to occupancy at the time?

Mr. McAteer: I will object to the whole line of [164] inquiry unless counsel can indicate in what particulars it bears on Paragraph 25 of the admitted facts, and also as to any issue.

Mr. Garland: Exhibit 22 that you presented, I didn't object to, but it has never been identified. If I can have Exhibit 22 I will have her identify it.

Mr. McAteer: It speaks for itself as far as the government is concerned.

Q. (By Mr. Garland): Mrs. Sprague——

The Court: Is it admitted?

Mr. Garland: It is admitted.

Q. (By Mr. Garland): ——showing you Exhibit 22, is that the record you went by?

A. Yes, it is. The record of Mr. Rosenbarger's inspection of the property.

The Court: You might bring out who he was.

Q. (By Mr. Garland): Now, did you have any

(Testimony of Emily A. Sprague.)

actual notice as to whether or not the government had a lease on the premises?

A. We had no notice.

Mr. McAteer: Objection to the interpretation of the question, that it calls for a legal conclusion.

The Court: Well, you might substitute the word "knowledge" instead of notice. [165]

Q. (By Mr. Garland): Any knowledge?

A. We had no knowledge.

Q. Did you have knowledge as to whether or not there were post offices in the Kitsap County area that did not have leases?

Mr. McAteer: Objection.

Mr. Garland: I asked her whether she had the knowledge or not, your Honor.

Mr. McAteer: I fail to see the materiality of the question.

The Court: Objection overruled.

Q. (By Mr. Garland): Did you have any knowledge?

A. It was my understanding——

Q. Did you have—yes or no—did you know whether or not there were?

A. I know of one that does not have.

Q. You know of one? A. Yes.

Q. Now, I will ask you that question: Of the one of which you know, did it or did it not have a lease? A. It did not have a lease.

Q. And where is that one located?

A. It is located at Silverdale. [166]

Q. Did your institution have a loan on that?

(Testimony of Emily A. Sprague.)

A. We have a loan on it, yes.

Q. How far is Silverdale from Winslow?

A. I would say about fifteen miles.

Q. Are they both considered in the north end of the county? A. Yes, sir.

Q. What is the comparison in your opinion as to the size of the community?

A. I would say the communities are about the same size.

Mr. Garland: I have no other questions.

The Court: I take it you have none, Mr. Jamieson?

Mr. Jamieson: I have none, your Honor.

Cross-Examination

By Mr. McAteer:

Q. Mrs. Sprague, how much rental is received from the restaurant property at the present time?

A. $158.00, which is——

Mr. Garland: Don't add anything. Just answer the question.

The Court: $159.00?

The Witness: $158.00 a month.

Q. (By Mr. McAteer): Is the restaurant property—are the dimensions of the restaurant property as shown on Plaintiff's Exhibit 22 [167] approximately correct? A. Yes, sir.

Q. Is it approximately of the same quality construction as the post office?

A. I understand it is.

(Testimony of Emily A. Sprague.)

The Court: You say "approximately"; what is that, the same size?

The Witness: The same standard, yes.

Q. (By Mr. McAteer): Does that include all the counters and fixtures in the restaurant?

A. No, sir.

Q. You stated that you had knowledge of month-to-month tenancy of a post office at Silverdale. Do you have knowledge of any post offices in any other portions of the State which do involve leases?

A. Yes, I understand that the Poulsbo post office has a lease.

Q. Was that your understanding in July, 1956?

A. I did not know at that time.

Q. You made no inquiry of any other post offices in the Kitsap County area or any other area concerning the tenancy of the post office in those communities prior to accepting this loan?

A. No, sir.

Mr. McAteer: No further questions. [168]

Redirect Examination

By Mr. Garland:

Q. Mrs. Sprague, how did we arrive at the figure of $158.00 a month to charge the restaurant that Mr. Sands owns?

A. That figure was arrived at——

Mr. McAteer: Object to the question as not material.

Mr. Garland: It is material.

(Testimony of Emily A. Sprague.)

Mr. McAteer: I will withdraw the objection.

A. (Continuing): That amount was arrived at by figuring what our taxes, fire insurance and miscellaneous upkeep of the building would be providing Mr. Sands did not redeem and inasmuch as he had the right of redemption we kept it at a figure just sufficient to cover our taxes and insurance and various items.

Q. (By Mr. Garland): You figured no capitalization? A. No capitalization whatsoever.

Mr. Garland: I have no further questions.

Recross-Examination

By Mr. McAteer:

Q. Could you provide the same figure as to the taxes, fire insurance and miscellaneous upkeep required by the post office department for the period March until today?

A. I couldn't without checking through the office. [169]

Q. Would that be approximately the same as the $158.00? A. No, they would run more.

Q. What factors are involved in the post office property that are not involved in the restaurant property that would cause the expenses to be greater?

A. Your taxes are more, and there would be a difference also in your insurance premium.

Q. Wouldn't it be more reasonable to say that it would be less because there is not the cooking or hazardous activity going on in a post office that

(Testimony of Emily A. Sprague.)

may be occurring in the restaurant, that would make the fire insurance premium less for a post office as compared with a restaurant?

A. The premiums do run more on the post office, as I remember the rate. The rate is a higher rate. I don't know why, but under the policy, as I recall, the rate on the post office is higher.

Q. Would the difference on the rate be ten per cent or one hundred per cent?

A. I wouldn't know without rechecking my files at the office.

Q. By your acquaintanceship with the files, would your opinion, your best recollection would be it was closer to ten per cent than one hundred per cent?

A. That is right, so far as the insurance is concerned. [170]

* * *

You say in determining the rental to be charged for the restaurant portion it included taxes, insurance and fire insurance and upkeep and, anything else?

The Witness: Miscellaneous bookkeeping cost in taking care of the account.

The Court: And no return on capital at all?

The Witness: As I recall, there wasn't any.

The Court: Very well. One other question. You indicated your knowledge with respect to the Silverdale post office as being occupied without a lease. Did you have that knowledge at the time you made this loan in 1956?

(Testimony of Emily A. Sprague.)

The Witness: I am—I couldn't say definitely at what time I did receive that knowledge, did get the information.

The Court: So that you may not have known it in 1956 when you made the loan?

The Witness: That is right.

The Court: Very well, that is all. [171]

* * *

Further Cross-Examination

By Mr. McAteer:

Q. Mrs. Sprague, is it true that the bookkeeping costs that were figured in the calculations in arriving at the $150.00 a month rental on the restaurant property included a six per cent return on the portion of the loan applicable to the restaurant?

A. That is true. It also included the monthly payment for the assessments.

The Court: It includes what?

The Witness: The monthly payments for the assessments against the property.

The Court: The local improvements?

The Witness: That is right.

Mr. McAteer: No further questions.

The Witness: All right.

The Court: A six per cent return on [173] the——

* * *

(Testimony of Emily A. Sprague.)

Further Cross-Examination

By Mr. McAteer:

Q. The original loan of $21,000 was broken down $8,445.88 to the post office and $12,454.12 to take up the mortgage on the—the prior mortgage on the restaurant? A. Yes, sir.

Q. As disclosed by the application for a loan, a portion of Exhibit 22, is that correct?

A. Yes, sir.

Q. So that the judgment of foreclosure, including cost of foreclosure and other fees, as disclosed by Defendant's Exhibit B-1 of $22,955.27 would be these original figures of $12,454.12 on the restaurant property, plus a pro-rata portion of the difference between $21,000 and $22,955?

A. That is right, and there would also be taxes and assessments that have been added to the balance.

Q. So, in round figures, the 6% would be based on $14,000?

A. I believe that that was—I would have to have our actual accounting records to be sure.

Mr. McAteer: Thank you. No further questions.

(Witness excused.) [178]

ARNOLD H. BURMASTER

upon being recalled as a witness for and on behalf of the defendant, and having been previously duly sworn, testified as follows:

Direct Examination

By Mr. Garland:

Q. Would you give the court your name, please?

A. Arnold H. Burmaster.

Q. Where do you live, Mr. Burmaster?

A. 1341 Trenton Avenue, Bremerton, Washington.

Q. What is your business?

A. I am an independent fee appraiser.

Q. And would you give us your qualifications, as you see them, for being an independent fee appraiser? A. I have——

Mr. McAteer (Interposing): We will admit his qualifications as given in his report.

Mr. Garland: All right.

Q. (By Mr. Garland): So that we will follow your testimony, would you tell us what Exhibit B-1 is?

The Clerk: B-2.

A. Is that this book?

Mr. Garland: Yes. [179]

A. This is an appraisal report on the—of the Post Office Building at Winslow, Washington.

Mr. Garland: In order to follow this witness' testimony, for purposes of illustration, I would like to offer B-2, I have given copies to other counsel,

(Testimony of Arnold H. Burmaster.)

not for the truth of what is in it as the truth, but for the purpose of illustrating his testimony.

Mr. McAteer: The Government has no objection to the admission of the exhibit for the purpose as indicated in the offer.

The Court: Very well, it may be admitted for such limited purpose as it is offered.

(Defendants' Exhibit B-2 admitted in evidence.)

Q. (By Mr. Garland): Did you at the request of the First Federal Savings & Loan Association make an appraisal for rental value of the Post Office Building at Winslow, Washington, recently?

A. I did.

Q. And in your preamble sheet to Exhibit B-1* —that is the sheet just before Sheet 1—did you make a report and did you have a report as to what the fair rental value of that building is?

A. Yes, $290.00 monthly.

Q. In following the exhibit and turning to Page 1, would you [180] go through your report page by page and explain what each item is and what you considered in coming to your appraisal of $290.00 per month?

A. Commencing at what page?

Q. Page 1, and will you say what Page 1 shows for the Judge?

A. Page 1, the first photograph shown is a gen-

*Exhibit B-2.

(Testimony of Arnold H. Burmaster.)

eral view of Winslow Way looking easterly from the intersection there. I have forgotten what that street is.

The next photograph is looking northerly at the east side of a portion of the front of the Post Office Building. It also shows the east side of the building and the highway, the blacktopped driveway.

Number 3 is looking at the front of the Post Office Building, looking northeasterly. Now, the division is there shown by a mark in the center. It should be—there is a projection line of the wall that comes out. From that line to the right would be the Post Office Building. There is a sign or a flag on the Post Office Building there.

Next is looking northeasterly at the west side of the coffee shop building adjoining the post office.

Number 5 is looking northeasterly at the rear of the post office.

Q. Do you mean southwesterly?

A. I mean southwesterly. It says "Southwesterly," and that [181] is what it is.

Q. Go ahead.

A. Page Number 4 is a sketch of the post office property—29, the lot is 29x192 feet. It also shows 11.5 feet easement on the right-hand, or east side. That is looking northerly from the bottom of the page.

Q. All right. Now, in making your appraisal did you take into consideration the value of the building, the construction value of the building?

A. Yes, I did.

(Testimony of Arnold H. Burmaster.)

Q. What value did you place on the land value? It appears on Page 8——

A. The land value—the land and land improvements I valued at $6,807.75.

Q. And did that include the blacktopping?

A. That included the blacktopping, yes. Without the blacktopping it was $362.50 less, so the bare land would be $6,445.25.

Q. Now, did you consider the value of the building? A. Yes, I did.

Q. And what did you figure to be the replacement—Page 10—what did you figure to be the replacement cost of the building?

A. The replacement cost is $28,228.

Q. How old is the building? [182]

A. Three years, as near as I know, as given me by the owners.

Q. And did you then figure the present-day value?

A. Yes. I took the full depreciation over a period of fifty years and the building is three years old, so that I took 6% of that as the current depreciated value, and that 6% is for physical depreciation and not for any other depreciation. As to general physical deterioration, I think that would just about cover it.

Q. What value then did you place on the building as of now? A. As of now, $26,534.32.

Q. And does that show you took into consideration the cost of completing the building, such as taxes and insurance?

(Testimony of Arnold H. Burmaster.)

A. Page 11, yes. This is taken from the Assessor's records at Port Orchard. The land valued at $600; improvements at $3,210, and the total assessed value at $3,810.

The 1960 tax is $217.78.

I would like to include there that in Kitsap County the assessed value is assumed to be 20% of the value of the property, for what that may be worth.

Q. It is the assessor's opinion?

A. It is the assessor's opinion, and sometimes it fits and sometimes it doesn't, in my opinion, and experience.

Insurance carried on the building at this time is a policy dated July, 1959, for $16,000 with a three-year rate of $26.08, making a total of $17.28, or one year [183] would be $139.09.

Q. What type of rental property is this? What is it considered as?

A. What it could be used for, is that what you mean?

Q. Yes.

A. Well, it is a multi-purpose building. It could be used for its present use, or it might be used for any other retail merchandising; possibly services of some kind.

When I speak of services, it could even be a doctor or dentist. It is not ideal for that, but particularly merchandising of any kind, or repairing of televisions, or things of that nature.

(Testimony of Arnold H. Burmaster.)

Q. The use to which it is now put, would you say that is a good use for that building?

A. Yes, I would say so.

Q. What other approaches to arrive at your $290.00 a month did you use in considering whether or not that was a fair appraised rental?

A. To arrive at a fair rental value it takes an amount that would compensate for the expenses and interest on the investment and a return of the investment on a straightline capitalization, and from that, according to my estimate, it requires approximately $290.00 a month to do that, covering my estimate of the expenses and the interest involved in the procedure; so I have developed—in [184] order to do that I have developed——

Q. (Interposing): Where do you set those figures out? What page?

A. Pardon me, on Page 12 it is set up on the capitalization of income approach.

Q. Go ahead.

A. Listed as expenses: Insurance, of course, is at $139.09; the taxes are $217.78; maintenance and repair is estimated at $300.00; and on that particular item a considerable amount has been allotted to an estimated requirement for painting; and the management is $5.00 a month, or $60.00 a year in case an individual who owned it would be absent and couldn't collect the rent himself, there probably would be a very nominal charge for collecting and handling the building.

That is the process of justifying this charge; I built up a replacement cost approach of the build-

(Testimony of Arnold H. Burmaster.)

ing. That is the value of the land by comparable sales and then the cost of the building, replacement cost, less depreciation—would give me the replacement cost less depreciation. That does not define the expenses.

So, in taking that out, that building—my answer to that hypothetical setup is $33,342.07.

Working the thing out, taking the building and working it out using a $290.00 a month rental [185] and depreciating—taking the expenses as given and using 6% as interest on the investment and recapitalization of over forty-seven years, I have used three years for depreciation, forty-seven years is slightly over 2%, and that makes a total of capitalized rate of .812. That brings the estimated value of the building to $26,855.54, and the land, of course, remains the same, $6,807.75, and in that process, by using $290.00 a month and taking those expenses off and using the capitalization rate of 6%, I came up with $33,663.29, a difference of $521 between the two processes.

Q. Now, your two processes, cost approach and income approach——

A. (Interposing): That is right.

Q. (Continuing): ——will come to approximately the same?

A. Very close. It could vary a little bit. $25.00 more in expenses would bring it almost identical.

Q. In determining what was the fair market value for that rental, did you check other comparative rentals? A. Yes, I did.

(Testimony of Arnold H. Burmaster.)

Q. What did you find in comparing rentals?

A. Well, I have a correlation there of my comparative sales. I have listed comparative sales.

Q. Will you tell us what they are and why you think they are comparable?

A. The ones that are not too comparable, you can turn through. [186]

Q. You turn through them?

A. You want me to go through them one by one?

Q. Yes.

A. Sheet Number 17 is known as the Kahn Building. That is owned by—the owner of record is—Archie Lippman, but his father, Otto, is on the ground and seems to be in complete control of the property.

That is used as a clothing store and has an apartment above.

The rent given to me on that by the man who is renting the property—there is a little difference in the owner's, but the amount is the same—the apartment rents for $85.00 and the main floor for $315.00, making a total of $400.00 for the building; so that the main floor is 42x100, 4,200 square feet, and that rents at 7½c and amounts to $315.00.

Q. And how does that building compare in structure, size and location and desirability to the Post Office Building?

A. It would compare favorably to the Post Office Building.

Q. Is it on the same street?

(Testimony of Arnold H. Burmaster.)

A. It is on the same street and has a driveway along the side of it.

Q. And the structure?

A. The structure—it is a well-built building.

Q. And the age is not too different? [187]

A. No; it is a very good building.

Q. On Page 18 what is there?

A. 18 is the adjoining building to this under the same owner. It is leased to Riley's Furniture; 30x88, 2,640 square feet. That per-square-foot monthly rental is $.0663. That is $175.00 a month. That is slightly less than one cent a square foot less than the Kahn Building; something like that.

Q. And does that fit into the rental?

A. It does. It is an inside building. There is a pattern for those buildings. They are shorter and smaller, of course.

Q. Take the next building. A. 19.

Q. Page 19.

A. That is Hansen's Electric, and that has 30x88 and 25x88; that is 4,840 square feet, and the total rent is $330.00, and that is $.0682 per square foot.

Q. Would you remind us how much is per square foot in the post office at $290.00?

A. The post office is——

Q. (Interposing): Would you give it to us?

A. Just a second here. $.10611; $.16011, that is at $290.00. You mean the proposed or fair estimated rent rate?

Q. Yes. Page 20 we are on now. [188]

(Testimony of Arnold H. Burmaster.)

A. Page 20, that is rented to Pacific Telephone and Telegraph. It is vacant at this particular time because, for reasons, I presume, of unknown to me they moved to another building, but their lease is still in effect and that rent, Mr. Lippman told me, was higher proportionately than the others because he had to make some special installations that ran a little higher than the other, and that is $125.00 a month for 16.5x88 feet. That is 1,452 square feet.

Q. And that is also——

A. (Interposing): That is vacant at this time, but he is still getting paid. It is still under lease.

Now, the next one is a drug store building and that is rented by Winslow Drug, and it pays $260.00 a month. That is 40x88 and contains 3,520 square feet. Now, that works out at $.0738 per square foot.

Q. Is that an inside building, also?

A. Yes, that is inside. They are all inside except the Kahn is an outside building.

Q. All right.

A. The next one, 22, is the Post Office Building at Poulsbo, Washington.

Q. How far is Poulsbo from Winslow?

A. There is a sign on the top of the hill that says eleven miles; maybe 12½ miles from the Post Office Building. [189]

Q. Are you acquainted with the comparable rents, with the post office rentals in general?

A. I haven't examined those in particular, but in general.

(Testimony of Arnold H. Burmaster.)

Q. In general?

A. They are approximately the same; some more and some a little less.

Q. All right, and the post office at Poulsbo, will you explain what you found there?

A. I talked to the owner, Joseph P. Nentor, Jr., the owner of the building, and I talked to him Friday, September 10, 1960, and I have listed there the amount that the land cost. That is taken from the deed of record in the title company's office. The purpose of that was—it is slightly irrelative but it does show the owner the cost of the land at the time it was bought.

That building contains 3,098 square feet and it is very comparable to the subject building in that it has 3,098 square feet, and the subject building has 2,733 square feet, and the rent on that is $316.66 per month, or $3,800.00 per year.

My estimated rent value of the subject building is $290.00 a month or $3,480.00 a year, or $.10611 against Poulsbo's $.10221.

Q. On a square foot rental you are within 4/1000ths—— A. (Interposing): Yes. [190]

Q. (Continuing): ——of the same amount?

A. Yes, a little less than that; three and something.

Q. Is the structure of the two buildings approximately the same?

A. Yes, it is a post office building. It is a concrete-block constructed building and in a general way it is very comparable to the subject building.

(Testimony of Arnold H. Burmaster.)

Q. And is it also available to get to the back of that building?

A. Yes, it is. It has a canopy upon four metal poles, three or four, just metal poles open all the way around. It is just a canopy in the back.

Q. All right; on Page 21—the Poulsbo is 22 and the next would be 23? A. 23?

Q. Yes.

A. That is on land—that is a piece of property that was sold by Myra L. Woodley, a widow, to Joseph P. Mentor, and Joan L. Mentor, his wife, May 9, 1960.

The price was $7,800.00; excuse Number 34966.

Q. We are not interested particularly in that. What would that lot be worth? That lot is worth $7,800.00? A. That is what he paid.

Q. The square-foot value of the land?

A. The square-foot value, on 51x92, that lot is—— [191]

Q. Yes?

A. 4,692 square feet. The square foot cost is $1.662.

Q. And the subject building has a square foot of?

A. 2,733—no, land is 4,568 square foot, and the square-foot value is $1.548.

Q. Is that its lease value in the vacant lot just close to the post office? A. Yes.

Q. In your opinion, if a person didn't have to rent the building and wanted to rent it, and the landlord didn't have to take a rent on it but wanted

(Testimony of Arnold H. Burmaster.)

to rent it, what would be a fair value for them to come to on the subject building?

* * *

A. $290.00, in my opinion, per month. [192]

* * *

Cross-Examination

By Mr. McAteer:

Q. Mr. Burmaster, I notice in your comparables that you figure a front foot cost for your land sale Number 12, but you do not figure a front foot cost for your rental comparable. Is it not a fact that front footage for a mercantile business is a factor to be considered?

A. In some cases it is. In some places one lot is wide and another is narrow. All things being equal, it would be a factor, but some lots have a narrow front footage and others a wide one and less depth. Each situation is usually different unless it is in a district where all lots are the same and all conditions are the same.

Q. Referring to Comparable Number 10, which is the drug store owned by Archie Lippman, on Page 21 of your report, that store is used as a drug store which utilizes a considerable amount of advertising in their front windows; is that not a fact?

A. Yes.

Q. And, therefore, it is desirable for a drug store to have a good percentage of their wall space

(Testimony of Arnold H. Burmaster.)

in the front? A. Yes, it would be.

Q. And that would be an advantage for a building used as a mercantile general purpose building, to have it wide and short rather than narrow and long? [193]

A. If you wanted to use it for drug store purposes only. There are other purposes which might not require that.

Q. Isn't it also a fact that the Number 10, the drug store, is comparable in length to that of the post office? A. It is 88 feet deep.

Q. The drug store is 88 feet deep?

A. Yes.

Q. And the post office is approximately 95 to 100? A. 92.

Q. 92? A. No, it is 100; exactly 100.

Q. And yet the drug store is 13 feet wider and its fair estimated rental value is $30.00 a month less?

A. The drug store had no side driveway to it, and the subject building has, which is, more or less—you would have a corner influence, much more easily accessible than the drug store building would be. Therefore, it would have a greater value in my opinion.

Q. Wouldn't that relate to the particular use that the building is used for and use requiring rear access is not necessarily the highest and best use?

A. In some cases that might be. In my opinion it would have a decided value, in my opinion, because you have an access you drive in and park

(Testimony of Arnold H. Burmaster.)

in the back on the vacant property that is in the back of the drug store—of the [194] post office building, drive in and park while you are shopping, and it could be a decided advantage in many, many businesses.

Q. What is the size of the lot in this drug store?

A. It is under the ground, I presume.

Q. My question was: What is the——

A. (Interposing): I mean, under the building.

Q. What is the lot size of the land upon which the building is placed? A. The drug store?

Q. Yes.

A. I wasn't too concerned about that. My comparable is rent space; what is unit rent. I didn't go into the capitalization part of that because it would have been impracticable because there would be no comparison.

Q. Did you determine whether the drug store had rear access? A. Yes.

Q. Does it? A. It does have.

Q. Where delivery trucks could park and deliver goods to the drug store? A. Yes.

Q. Wouldn't that essentially serve the same function as a side alley?

A. To a degree; you would have to build an addition on it [195] for protection for a loading platform; I presume you would.

Q. Wouldn't the loading platform be——

(Whereupon, there was a brief pause.)

(Testimony of Arnold H. Burmaster.)

Q. Wouldn't a loading platform be an adjustment to the property that would be required for some particular uses and not required for others?

A. Yes, if you were speaking of post office use. Comparables to the subject building is what I am comparing it to, and the subject building does have that which would make it more useful for most purposes, in my opinion, than the drug store, and, therefore, would command a higher rent. It is quite obvious to me. [196]

* * *

Q. (By Mr. McAteer): Mr. Burmaster, the comparable you have used, Numbers 1 to 5, are all in Winslow, Washington, are they not?

A. Yes, they are.

Q. Did you inquire of the tenant or of the landlord as to those five comparables concerning whether or not utilities were furnished by the landlord?

A. No. I did inquire regarding heat.

Q. And what was the answer?

A. Heat is supplied by the tenants.

Q. In all five cases?

A. Yes, I think so. I asked him about two or three and I said, "Do the tenants furnish their own heat?" and he said, "Yes, I have a propane tank and they get it a little cheaper, but they supply their own heat."

Q. That is what you found out as to Comparable Number 1? A. Yes.

(Testimony of Arnold H. Burmaster.)

Q. And to Comparable Number 2?

A. Yes. [197]

Q. Number 3?

A. That whole group is in there under the same ownership.

Q. Which of those five are on a month-to-month tenancy?

A. I can't answer that question, sir.

Q. And which ones are on a lease?

A. Kahn's is on a lease and that is the only one I know of.

Q. In your experience are tenants who hold under leases generally——

Mr. McAteer: Strike that.

Q. (By Mr. McAteer): Is it not a fact that the monthly rental as established by a long-term lease is generally somewhat less than the rental paid on a month-to-month tenancy because of the stability of occupancy?

A. In some cases, yes, and in some cases, no. That would probably—it is difficult to answer that problem exactly in every case. In general, that is true, the general impression. It is my idea that, generally speaking, that long-term leases get it for a little bit less than the monthly tenants. However, in all those things it is so hard to make a fast rule on that because an owner sometimes, it has been my experience, on occasions have tried to fill up the building with tenants. This could be, maybe, to get the thing started and to get them in business

(Testimony of Arnold H. Burmaster.)

to make the thing go. So it is hard to [198] apply a fast rule.

A long-term tenant naturally would be favored over a month-to-month deal, but not necessarily always.

Q. Is it not always a fact that a tenant such as J. C. Penney's who would be willing to grant a five-year lease, would be favored in rental terms over a businessman with little business experience and it was a relatively new venture?

A. I would say yes, Penney's, Montgomery-Wards and Sears are classed as A-1 leases, but again, the same conditions apply, particularly in somewhat little places.

Q. Would it not also be a fact that the Government would be more closely akin to a solvent corporation like J. C. Penney's, rather than an upstart businessman who has little or no financial backing or experience?

A. Very much so, but it would depend entirely on the terms of the lease and the conditions under which they could move out. All those things would enter into it. As a rule, definitely, financial responsibility is a determining factor, such as oil companies about leases.

Q. Is it not also a fact that all of the comparables, 1, 2, 3, 4 and 5, are located at Winslow, Washington, and have access from the rear?

A. Yes, they do. I don't know of any I know that don't because it is there.

Q. And the utility to the occupant having a side

(Testimony of Arnold H. Burmaster.)

alley would [199] be merely a matter of preference without any economic advantage that you can point to?

A. Yes, it would definitely be an economic—I point, for instance, to parking for the drug store or any business located there. If you are there, you come in the alleyway below there. With the post office building there is this. You turn in the alley and park. It is a decided advantage. Necessarily, just the distance makes that.

Q. How much parking facility is available at the post office? A. 92 feet.

Q. And that is room for how many cars?

A. 92 feet would be room for about 10 cars, possibly; with the wide cars, maybe nine, ten feet to a car.

Q. Some of the comparables, notably Comparable Number 2, is only 88 feet in depth. How deep is that lot?

A. I don't know, sir. Comparable Number 2? That is—I think it is the same difference. I am not appraising the property, see, but the rental value; the square-foot rental value on those properties.

Q. If you are adding a plus value for parking space on a tenant other than Riley's Home Furnishings, they could well put a parking lot in the rear of Comparable Number 2, could they not? [200]

* * *

A. I think it would be, possibly, not impossible

(Testimony of Arnold H. Burmaster.)

but highly improbable to stick a parking lot in the back of Riley's store and I don't think the owner would go for it. If he did, he would get more compensation for the ground if he is renting for parking purposes, if he is making a public parking lot in there.

Q. Do you know how long Riley's have occupied that? A. No, sir, I do not.

Q. Are you acquainted with the—I notice you have no comparables of similar general purpose mercantile stores in Poulsbo?

A. No. I have a very fine comparable that is used for the same purpose in Poulsbo that was very satisfactory to me, and again we run across the same identical thing, sir. If I start looking around for the waterfront at Poulsbo and those little stores, they are not comparable to the [201] properties I am appraising. It is my mission to find as near a comparable as I can, and in estimating and in balancing the value.

Q. What factors would make the property at Poulsbo dissimilar?

A. Dissimilar to the subject property?

Q. Yes.

A. There is no factor. I don't think—the two towns are about the same population and they are about the same size, and I don't see anything that would particularly—see anything that would make them dissimilar. The buildings are somewhat similar. They have a driveway and a canopy in the rear.

(Testimony of Arnold H. Burmaster.)

Q. Referring to Comparable Number 2, what is the general condition of that building?

A. It is as good as the rest of them there, very good.

Q. That building is approximately the same frontage as the post office property, is it not?

A. Well, no—yes, frontage. I have it 30 feet.

Q. And it is 88 feet as compared with 100 feet in depth? A. 192.

Q. I am speaking of the improvement.

A. Oh, the improvement; yes, 100 feet.

Q. And the square footage is roughly the same, is it not? A. Yes, it is, generally, yes.

Q. And that has a square-foot rental basis of $.0663? [202] A. Yes.

Q. If the subject property was occupied by someone other than the Government, would they not pay a rent that is comparable with the going rate on the same street?

A. Sir, anyone in business would quickly recognize the advantage of that driveway along the side. It doesn't matter what business you are in, parking is certainly one of the things that are problems in almost any business. Almost any little community has them. They would recognize the difference in value of the two places.

Q. In comparing the process of arriving at an opinion of reasonable rental value as compared with the process of arriving at a reasonable sales price, is it not more difficult to arrive at a valuation, a rental valuation compared to a sales price?

(Testimony of Arnold H. Burmaster.)

A. In order to find the value, rental value, of any commodity, any goods or any property, it is first necessary to know what that thing costs and what the expense involved will be, and then you get your total and then you estimate the value of money and the duration of your investment, see, so that, first, you have to do what you asked me about before you can determine the rental value. I mean, that is the better proof. You can get it by comparative rents, which is usually done in a quick way, but in buying a building you want to know the income and [203] the durability of it. You certainly would have to have a basis on which to predicate that, because you must allocate the percentage that you want to use in covering this investment.

Q. But the real test is what the property will bring in the market place, is it not?

A. That is right, comparable properties.

Q. Rentals are a poor test of what the property is worth—poorer than the mathematical formula of arriving at a valuation and then capitalizing it?

A. There is nothing better; if you can find the identical property under the identical condition, there is nothing better, and that is the one difficult thing about appraising, that it is hard to find the most desired comparable.

Q. Doesn't Orgel in his book on valuation—you are familiar with that volume, are you not?

A. Who?

Q. Orgel's?

(Testimony of Arnold H. Burmaster.)

A. I don't know that I read his. I have read so much in the American Appraiser.

The Court: Orgel is a law book.

The Witness: I don't know.

The Court: Is that the one you are referring to?

Mr. McAteer: Very right. I was misinformed, your Honor. [204]

Q. (By Mr. McAteer): In appraising property using comparable sales or comparable rentals, it is almost, in every case, impossible to find identical comparables, is it not?

A. It is usually very difficult to find identicals.

Q. The most an appraiser can normally hope to find are properties with similar characteristics?

A. That is right.

Q. Located in the same vicinity?

A. In comparable locations.

Q. Is it not true that as to residences the same type of a house in Bremerton may sell for substantially less than the same house in Seattle?

A. It could be. That depends again on it would not be in a comparable location. The thing that would detract from it would be economic obstacles or the economics would apply to the district. There are so many things involved in that. My answer to your other question was that under the same conditions that would apply to districts, to surroundings, schools, and everything else—the economic influence, in other words.

Q. The economic influence of the comparable one to five are more closely identical to the subject

(Testimony of Arnold H. Burmaster.)

property than Comparable Number 6 located in Poulsbo, is it not?

A. I would say not, because I think the business property [205] is somewhat the same and the utility of the two are the same and the price—about as close as you could get. The one at Poulsbo, the Post Office Department is paying $.10211.

Now, the value set up for this comparable utility post office building of the same type is set up for $.10611. It is awfully close. A difference of $25.00 in that capitalization income approach would make them identical and it is awfully hard to get much closer than that in any building.

Q. On Comparable Number 1, looking at the photograph, what is on the right-hand side of the building, looking at it from the front?

A. A paved alley.

Q. And what is in the rear of that building?

A. Alley, paved, and dirt cut back.

Q. Is there parking alongside the building in the rear?

A. You could if you blocked the parking strip there.

Q. If you were to apply the average of the five comparables located in Winslow to the square footage of the building of the subject property, what valuation would you arrive at?

A. I don't know, sir. I didn't use those. They weren't good enough.

Mr. McAteer: No further questions. [206]

(Testimony of Arnold H. Burmaster.)

Cross-Examination

By Mr. Jamieson:

Q. Mr. Burmaster, are you pretty well acquainted with rental values?

Mr. Jamieson: Strike that, please.

Q. (By Mr. Jamieson): Have you been very well acquainted with rental values in Winslow for any period of time?

A. Not until I came over to make this evaluation, sir.

Q. And when you were making that evaluation, did you make that investigation into rental values back to December, 1956? A. No, sir. [207]

* * *

SAMUEL J. CLARKE

upon being called as a witness for and upon behalf of the defendant, and upon being first duly sworn, testified as follows:

The Clerk: Will you state your full name and spell your last name, please?

The Witness: Samuel J. Clarke, C-l-a-r-k-e.

Direct Examination

By Mr. Jamieson:

Q. Mr. Clarke, where do you reside?

A. On Bainbridge Island, Manito Beach West on Bainbridge Island [210]

* * *

(Testimony of Samuel J. Clarke.)

A. Before I became a realtor I was an engineer for the United States Government in the Topographic Section of the Navy Yard where I helped prepare maps and briefs for condemnation of property on which was based the fee which the Government would offer.

Also, since being in the business as a licensed realtor, I have been called on to appraise properties for states, sometimes representing the State of Washington and sometimes the estate itself.

Q. How many times have you been called upon to testify in regard to an independent fee appraisal?

A. I believe this is only the third time.

* * *

Q. And in making that appraisal, did you determine a reasonable rental value as of December 1, 1956? [211] A. Yes.

* * *

Q. Will you answer the question as to what is your appraisal as to the reasonable rental value as of December 1, 1956? A. $330.00 a month.

Q. All right, how did you determine this appraisal value? I took the replacement value of the building plus the cost of the land and I have determined in my own business that a fair return on an investment, considering the money invested and the taxes and the insurance and the depreciation for necessary repairs, to be made for tenants, to be roughly, in fact very accurately, 1% per month, and if a person can't get 1% a month in my business, then they [212] should go out of the business and

(Testimony of Samuel J. Clarke.)

on my own properties that is the determination I use and that is what I used in this case. [213]

* * *

Cross-Examination

By Mr. McAteer:

Q. Mr. Clarke, are you a graduate of any school?

A. No. You refer to colleges?

Q Yes. [215]

A. I didn't quite complete my university course.

Q. Your work as an engineer for the Government had to do with mapmaking and drafting?

A. And design, yes.

Q. It did not have anything to do with placing valuations on property?

A. Not as—to a great extent, except in the one instance I mentioned when the Navy was condemning various properties in this part of the country in the beginning of the war.

Q. And what capacity did you play in placing valuations on properties for the Navy at that time?

A. I was topographic engineer and would prepare plans and maps of the areas to be condemned, and would consult with the official who went and condemned these properties that needed to be condemned. Sometimes they would take an estimate for what it was worth and settle for that, but many cases had to be condemned.

Q. It is true then that your function in preparing topographic maps was to go in the field and

make maps of the improvements, whether frame or concrete, and prepare data used by the actual person who placed a valuation on the property?

A. That is true.

Q. But you, yourself, did not place a valuation on the property? A. No. [216]

Q. What type of property did you appraise in your two other court experiences as an appraiser?

A. They were both residences.

Q. What states were they located in?

A. Both on Bainbridge Island.

Q. And you have had no previous experience as an appraiser of commercial property?

A. Not in court.

Q. And it is a fact that you have had no previous experience appraising leasehold valuations as compared with a sale valuation?

A. You might construe it that way. [217]

* * *

CHARLES L. SEAVEY

upon being called as a witness for and on behalf of the defendant, and upon being first duly sworn, testified as follows:

The Clerk: Will you state your full name, and spell your last name, please?

The Witness: Charles L. Seavey, S-e-a-v-e-y.

Direct Examination

By Mr. Jamieson:

Q. Would you please tell the court your name, sir? A. Charles L. Seavey.

(Testimony of Charles L. Seavey.)

Q. And where do you reside, sir?

A. On Bainbridge Island.

Q. And what is your occupation?

A. I am retired.

Q. What were you before you retired?

A. The postmaster at Winslow.

Q. Were you the postmaster at Winslow between January 1, 1956, and December 6, 1956?

A. Yes, sir.

Q. What period of time were you postmaster at Winslow?

A. From September, 1954, to July in 1958. [226]

* * *

Q. (By Mr. Jamieson): Do you know of your own knowledge when the postal equipment and post office facilities were moved into the building that is presently occupied by the post office at Winslow, Washington?

A. I don't know the exact date. It was somewhere in late 1956, in my memory.

Q. And how did you have—did you have charge of the post office and the moving in?

A. Yes, I did. [227]

* * *

Q. If, prior to May 23, 1956, anyone would have come to you and asked you about the terms of any proposal to lease by Mr. Camaratta of a building at Winslow, Washington, would you have been able to inform them?

A. No, I wouldn't.

* * *

(Testimony of Charles L. Seavey.)

Q. (By Mr. Jamieson): And if, specifically, Earl L. Sands had come and asked [228] you for information regarding a proposal to lease by Mr. Camrada, would you have been able to inform him?

A. I don't think so.

Mr. Jamieson: I believe that is all.

Cross-Examination

By Mr. McAteer:

Q. Mr. Seavey, you have stated that you would be unable to inform a person asking you a question as to the terms of that proposed—or proposal to lease; but it is a fact that you would be able to tell them of the existence of such an agreement?

A. Of a proposal to build or proposal to lease?

Q. Of some agreement? A. Yes. [229]

* * *

Q. Mr. Seavey, you—prior to May 23, 1956, you—it is a fact that you knew of the existence of some agreement between the Post Office Department and James Camrada? A. Yes.

Q. If someone had inquired of you what was the nature of that agreement, what would you have told them?

A. Well, it was a proposal to build, purchase and lease.

Q. The building and leasing of a post office building is not a primary responsibility of a local postmaster? A. No, sir.

(Testimony of Charles L. Seavey.)

Q. But such information is available at the Postal Inspector's Office in Seattle?

A. I believe so.

Q. If someone were to have inquired of you in the spring of 1956, or in the summer of 1956, as to the nature of that agreement, it is a fact that you would have referred them to the Postal Inspector or to the Seattle Office, or to some other appropriate Post Office official who had actually some knowledge of the agreement? A. Yes, sir. [230]

* * *

Cross-Examination

By Mr. Garland:

Q. Were you under any instructions as to what information you would give to a person if they inquired about a lease being constructed—about a building being constructed for the Post Office; were there any instructions as to who you should give information to? A. No, sir.

Q. You heard the testimony this morning of the inspector that was in charge of the Post Office being built; did you hear that this morning?

A. Yes.

Q. And he said he would not give out information, as I understand it, unless it was to a person that was authorized. Did you have the same instructions or not?

A. I had no instructions on it.

Q. Did you personally have any knowledge of it,

(Testimony of Charles L. Seavey.)

of what the building was being built for, and the terms of the lease, or if there was a lease?

A. No.

Q. That was not your department?

A. No. [231]

* * *

EARL L. SANDS

upon being recalled as a witness for and upon behalf of the defendants, and having been previously duly sworn, testified as follows: [237]

* * *

Redirect Examination

By Mr. Jamieson:

Q. Mr. Sands, have you formed an opinion as to the reasonable rental value of the premises here in question? That is, the building being occupied by the post office? A. Yes, I have.

* * *

Q. Do you have an opinion as to the reasonable rental value of the premises here in question as of December 1, 1956? A. I do.

Q. And what is that? A. $333.00 a month.

Mr. Jamieson: Thank you.

(Testimony of Earl L. Sands.)

Recross Examination

By Mr. McAteer:

Q. Mr. Sands, how did you arrive at that evaluation?

A. Well, by talking with other people that have buildings, [254] and talking to people that rent warehouse space and checking with Mr. Mentor to find out what he was getting to a post office comparable to mine at Poulsbo, and checking on the amount of money I have in it.

I have $33,000.00 in it, and figure I should have at least 1% on my investment.

Q. Are you adopting the opinion of Mr. Clarke?

A. Of Mr. Clarke—do you mean Mr. Clark Mentor in the Poulsbo Post Office?

Q. No, Samuel J. Clarke, who appeared as a witness.

A. No, I have had my price on this building long before Mr. Clarke ever entered into it.

Q. In your opinion has the rental value of the post office gone up or gone down since December, 1956?

A. Since December, 1956? It certainly hasn't decreased any. I am not in any position to state what other real estate—how it has gone up, but I do know that property over there has not gone down.

* * *

Mr. Jamieson: The defendant Sands rests, your Honor. [255]

* * *

OTTO LIPMAN

upon being called as a witness for and upon behalf of the plaintiff, and upon being first duly sworn, testified as follows:

The Clerk: Will you state your full name and spell your last name, please?

The Witness: Otto Lipman, O-t-t-o L-i-p-m-a-n.

* * *

Direct Examination

By Mr. McAteer:

Q. Do you own any property in Winslow, Washington?

A. I do, adjoining the Sands' property.

* * *

Q. Thank you. How much property do you own?

A. 192 feet facing Winslow Way, and 310 feet back.

Q. Does that property consist of the five stores that were testified to—— [257] A. Yes, sir.

Q. ——by Mr. Burmaster, earlier——

* * *

(Testimony of Otto Lipman.)

Q. As to the property commonly known as Kahn's, and Mr. Burmaster—did Mr. Burmaster correctly state the rental of the main floor of that building?

* * *

Q. What is the rental received for the main floor of that building?

A. The main floor is $275.00, and the upper floor is $125.00. It is a five-room apartment.

The Court: The upper is what?

The Witness: A five-room apartment.

The Court: What is the rent for the upper?

The Witness: $125.00. They are all together, listed as joint. [258]

Q. (By Mr. McAteer): Mr. Lipman, you have stated that your property is 192 feet in the front and 310 feet deep? A. Yes, sir.

Q. Describe the rear area of your property.

A. Well, the rear area is customer parking, consisting of about, I should say, 145x100, or 150.

Q. You have 14,000 to 15,000 square feet of parking area?

A. Approximately. That is all we need.

Q. From what directions, if any, is there access to that parking area?

A. Access from Winslow Way, 14½ feet, and after you come in the back, you go out in about a twenty-foot alley. I have two accesses, one in the front and one in the back.

(Testimony of Otto Lipman.)

Q. Is this parking area utilized by the five stores facing Winslow Way?

A. Yes, sir, Mr. Wohlfrom knows it, he saw it.

Q. Does it provide suitable parking for the demands of those commercial establishments?

A. Oh, yes.

Q. What is the nature of the construction of that building? A. Oh, I don't know; first-class.

Q. Are the walls plastered? A. Oh, yes.

Mr. Jamieson: Excuse me. Will you speak up? I am [259] sorry.

A. I say, first-class buildings. You couldn't make them any better.

* * *

Q. What is the material composition of the walls?

A. The walls are all plastered and rock lath.

Q. And underneath the plaster is rock lath?

A. Rock lath, insulation.

The Court: Concrete block?

The Witness: Concrete block, and insulation and plaster, and the roof is made out of regular insulation.

Q. (By Mr. McAteer): When were these buildings built? A. About five years ago.

Q. Are the walls separating the individual buildings single walls or party walls, if you know?

A. They are plastered on both walls. They are made so I can remove a wall and make one store out of two. They have iron posts. [260]

(Testimony of Otto Lipman.)

If I want to make a store bigger, I can take out a wall and still the iron posts will hold it.

Mr. McAteer: No further questions.

Mr. Jamieson: I have no questions.

The Court: Now, Mr. Lipman, as long as you are here, I think I will ask you a few questions.

The Witness: Okay.

The Court: Of these various buildings that are referred to here, one of them is known as the Kahn property?

The Witness: That is right.

The Court: And the other, the Riley's Home Furnishings?

The Witness: Yes, sir.

The Court: And the third one is Hansen's Electric?

The Witness: Yes, sir.

The Court: And four is occupied by Pacific Telephone and Telegraph?

The Witness: Yes, sir.

The Court: And five is the Winslow Drug?

The Witness: Yes, sir. This is the first one I built when I came on the island. We started it ourselves.

The Court: When was that built?

The Witness: About eight years ago.

The Court: Now, the other buildings were all built about the same time?

The Witness: Well, Kahn's is two years old and the [261] others are about five years old.

The Court: With respect to the other building,

(Testimony of Otto Lipman.)

has the rental been about the same for the last five years?

The Witness: Well, the rental has been the same for the last five years.

The Court: There hasn't been much variation?

The Witness: No, the lease has been written together, almost; one of them a couple or two or three months later, but the leases were issued upon completion of the building.

The Court: So that Riley's has been occupied under lease for five years?

The Witness: Four and one-half years now.

The Court: So that the rental they are paying now is the same as they were then?

The Witness: Yes, sir; they have an option, also.

The Court: What is that?

The Witness: Five more years' option.

The Court: There is a lease for five years with another five-year option?

The Witness: Yes.

The Court: What about Hansen's?

The Witness: They have a change, and the telephone company is ten years straight, and the drug store, ten years straight, and Kahn's had it for two years' trial, and now they took a lease for five years more. [262]

The Court: What was the rental for the first two years?

The Witness: The same.

The Court: I think that is all.

Mr. McAteer: You may inquire of the witness.

(Testimony of Otto Lipman.)

Mr. Jamieson: I have no questions of the witness.

Mr. Garland: I think I have one.

Cross-Examination

By Mr. Garland:

Q. Mr. Lipman, the breakdown on your building as rented to Kahn is not made on the lease, is it; so far as you and Kahn are concerned, you get $400.00 a month? A. I get $400.00 a month.

Q. And you break it down as $275.00 and $125.00 for your capitalization?

A. We were talking, when they took the store alone, and then they figured they wanted to bring in a manager and wanted an apartment, and so I recalled the lease and made it $400.00.

Q. You don't know how they break it down; they may make it $315.00 and $85.00?

A. I originally quoted them $275.00 and then I upped it to $400.00.

Mr. Garland: That is fine.

(Witness excused.) [263]

JOHN L. VAN BUSKIRK

upon being recalled as a witness for and upon behalf of the plaintiff, and having previously been duly sworn, testified as follows:

Direct Examination

By Mr. McAteer:

Q. Mr. Van Buskirk, are you acquainted with the various costs to the post office of post offices in various communities in your region?

A. My principal duty is to analyze the bids that come in and see that they are properly justified and properly in line with what the Post Office should or can pay for the facility, yes.

Q. Have you or your staff prepared a cost breakdown of the rentals paid by the Post Office for the various post office facilities in your region?

A. We keep a running or spot check from time to time and have for the last year and a half just to keep in tune with the general tendency of post office rents and how we are making out with our bidding, and what we need to straighten them [265] out.

* * *

Q. (By Mr. McAteer): What is the annual rental paid by the Post Office for the facility at Marysville?

A. At Marysville the annual rental is $4,200.00.

Q. And how many square feet does that involve?

A. Our square-foot area in that is 3,206 feet.

(Testimony of John L. Van Buskirk.)

Q. What is the type of——

Mr. McAteer: Strike that.

Q. (By Mr. McAteer): What is the annual rental paid by the Post Office at Redmond, Washington?

A. Redmond? We have an annual rental of $6,800.00.

Q. And the square footage?

A. Square footage in that is 6,163 feet.

Q. What is the annual rental at East Stanwood?

A. East Stanwood is $3,816.00.

Q. And the square footage of the building?

A. The square footage of the building is 3,102 feet.

Mr. Jamieson: Will you say that again, please?

The Witness: 3,102 feet.

Q. (By Mr. McAteer): The square footage of the building at Darrington? [271]

A. The Darrington building, the square footage?

Q. Yes. A. 1,793 feet.

Q. 1,7—— A. 1,793 feet.

Q. And the rental paid?

A. $1,700.00. [272]

* * *

EARL A. WOHLFRAM

upon being recalled as a witness for and upon behalf of the plaintiff, and having been previously duly sworn, testified as follows:

Direct Examination

By Mr. McAteer:

Q. Mr. Wohlfram, did you handle the negotiations on behalf of the Post Office for the lease—construction and lease of the facilities at Poulsbo?

A. Yes, sir.

Q. Will you compare the—describe generally the construction of the building at Poulsbo in comparison with construction of the building at [273] Winslow.

* * *

A. Basically, the Winslow and the Poulsbo buildings are the same; the same type of construction and the same general plan and the same materials in most respects. That is, concrete block walls, one-story building, asphalt tile floors; the facilities in the Poulsbo building are somewhat more extensive than they are in the Winslow building.

Mr. Jamieson: Excuse me. I didn't hear the witness. Will you repeat that?

A. (Continuing): The facilities in the Poulsbo building are somewhat more superior to those in the Winslow building. In the Poulsbo building we have what they call a box lobby which requires an additional wall inside whereby the door can be locked between the finance section and the box,

(Testimony of Earl A. Wohlfram.)

section at night so that the box section can remain open twenty-four hours without the public having access to the finance section.

It also includes what we called a curtain wall, which is a wall over the box section to partition it off from the work room so that nobody can climb over the top and get into the building. [274]

I believe at Winslow we have just a screen wall, or screen equipment above the box section and finance section.

Then the rest facilities for male and female employees, of course, are somewhat more extensive because of the larger personnel in the office.

Q. (By Mr. McAteer): Does the building at Poulsbo have four independent walls?

A. Yes, sir.

Q. The facility at Winslow has a party wall?

A. That is right.

Q. Was the party wall at Winslow a pre-existing wall? A. It was.

Q. And that would decrease cost of construction at Winslow? A. Yes, sir.

Q. Have you an opinion—was the lease—construction and lease of the property at Poulsbo arrived at under the call for bids and proposal to lease procedure?

A. Yes, sir. There was this difference, that at Winslow it was upon bid. That is, each interested owner or bidder could propose a site of his own. At Poulsbo the Government optioned one site and called for bids for construction of the building on

(Testimony of Earl A. Wohlfram.)

that site. The successful builder, or bidder, to buy the land and put the building on this one location.

The Court: That was the procedure followed at [275] Poulsbo?

The Witness: Yes, sir. It was an option site by the Government.

The Court: Do I understand that the Government received an option on the property?

The Witness: An option to purchase, yes, sir, and the option has been assigned to the successful bidder who purchases the ground and builds the building.

The Court: At the price affixed for it?

The Witness: Yes, sir, at the price affixed in the option.

Q. (By Mr. McAteer): When you received the bids, do you recollect, do you collect all the bids and forward them to the Department?

A. Yes, sir.

Q. With your recommendation?

A. Yes, sir.

Q. In making your recommendations, do you become generally acquainted with the rental values of properties in the area? A. Yes, sir.

Q. Was the bid at Poulsbo, Washington, generally in line with the reasonable rental value of other rental properties at Poulsbo?

A. Well, yes. Ordinarily the Government gets as favorable [276] terms as any rental will if you have a comparable building to compare the post office with, just——

* * *

(Testimony of Earl A. Wohlfram.)

Q. Then in general the cost to the Post Office reflects the market value in the area on a favorable basis to the Post Office? A. That's right. [277]

* * *

Cross-Examination

By Mr. Jamieson:

Q. Mr. Wohlfram, the effect of a party wall really doesn't affect the value so far as rental is concerned, does it?

A. No; well, yes, it will to the extent that the cost of construction will be somewhat lower and then the building should rent for a lower rate—maybe at the same rate, but there wouldn't be the investment there to base that rent on where you built four walls.

Q. But still there is still the same number of square feet, isn't there? A. That is right.

Redirect Examination

* * *

By Mr. McAteer:

Q. What factors account for the variation in bid price from [278] area to area?

A. Well, I think there may be a number of factors. One town is a progressive town where business is quite active and rentals are higher than in a town where, you might say, it is retrogressing and business is going down rather than up. That has a bearing on the rentals that can be demanded for

(Testimony of Earl A. Wohlfram.)

property, and I think it is the principal cause for variation in rentals.

* * *

Q. At the time that the contract was entered into with Camrada, where was the principal business activity in Winslow in relation to the subject property?

A. Well, it was on Winslow Way. The office—Mr. Camrada's property was possibly two or more blocks from the former location and at that time was in an area that had not been [279] very well developed for business purposes.

I don't know the directions in east and west of Winslow Way, but we moved it from one end of the town up to Mr. Camrada's property, which was, you might say, on the opposite end of the street.

* * *

Recross-Examination

By Mr. Garland:

Q. Was Winslow considered in 1946 as a progressive community where the rents would be, or would have probably been higher?

A. I considered it a progressive community.

Mr. Garland: That is all. I beg your pardon, I had my years off there.

Q. (By Mr. Garland): In 1956? You understand what I meant? A. Yes, sir.

* * *

[Endorsed]: Filed March 10, 1961. [280]

[Title of District Court and Cause.]

No. 4959

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Harold W. Anderson, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Circuit and Rule 75(o) of the Federal Rules of Civil Procedure and designation of counsel, I am transmitting herewith, the following original papers in the file dealing with the action together with exhibits, as the record on appeal herein to the United States Court of Appeals at San Francisco, to wit:

1. Complaint, filed Dec. 4, 1959.

6. Answer of First Federal Savings and Loan Association of Bremerton, filed Jan. 7, 1960.

30. Pretrial Order, filed Sept. 13, 1960.

34. Court's Memorandum Opinion, filed Oct. 18, 1960.

40. Exceptions of First Federal Savings and Loan Association of Bremerton to Findings of Fact and Memorandum of Authorities, filed Nov. 28, 1960.

42. Findings of Fact and Conclusions of Law, filed Dec. 5, 1960.

43. Judgment and Decree filed December 5, 1960.

45. Notice of Appeal on behalf of First Federal Savings and Loan Association of Bremerton, filed Feb. 3, 1961.

46. Cost Bond on Appeal, filed Feb. 3, 1961.

47. Designation of Contents of Record on Appeal, filed Feb. 3, 1961.

50. Court Reporter's Transcript of Proceedings in 1 volume (original), filed March 10, 1961.

Plaintiff's Exhibits 1 through 23, inclusive.

Defendants' Exhibits A-1 through A-7, inclusive, and B-1 through B-3, inclusive.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for preparation of the record on appeal in this cause, to wit: Notice of Appeal, $5.00 and that said amount has been paid to me by the attorney for the appellant.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle this 10th day of March, 1961.

[Seal] HAROLD W. ANDERSON,
Clerk;

By /s/ TRUMAN EGGER,
Chief Deputy.

[Endorsed]: No. 17303. United States Court of Appeals for the Ninth Circuit. First Federal Savings & Loan Association of Bremerton, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed March 13, 1961.

Docketed March 16, 1961.

/s/ FRANK H. SCHMID,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for Ninth Circuit

No. 17303

UNITED STATES OF AMERICA,

Respondent,

vs.

FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF BREMERTON,

Petitioner.

STATEMENT OF POINTS ON APPEAL

Comes Now the appellant, First Federal Savings & Loan Association of Bremerton, and hereby makes the following Statement of Points upon which they intend to rely upon appeal:

I.

The court erred in determining federal laws, and the rules of the post office department were determinative as to the title of the property on which the post office claims they have an agreement to make a lease. Petitioner contends said agreement or lease was ineffective without recording and notarizing as provided by the laws of the State of Washington.

II.

The Court erred in deciding the evidence in this case established imputed knowledge to First Fed-

eral Savings & Loan Association of Bremerton of the interest of the United States to the property in question.

III.

The equities in this case are such that it would be inequitable to enforce an agreement to make a lease, when the Government knew the rent they had agreed to pay was disportionately small to the value of the land and where the rent actually paid is unconscionable low compared to the rent that should be paid and is paid other places for similar rentals, and where the rent paid is so low as to be confiscatory.

GARLAND & BISHOP,

/s/ MARION GARLAND, JR.,

Attorneys for Petitioner First Federal Savings & Loan Association of Bremerton.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 16, 1961.

No. 17304

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

HOLLY-GENERAL COMPANY, DIVISION OF SIEGLER CORPORATION,

Respondent.

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF OF RESPONDENT HOLLY-GENERAL COMPANY, DIVISION OF SIEGLER CORPORATION

SWEENEY, IRWIN & FOYE
By: PETER W. IRWIN
639 South Spring Street
Los Angeles 14, California

Attorneys for Respondent

No. 17304

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

HOLLY-GENERAL COMPANY, DIVISION OF SIEGLER CORPORATION,

Respondent.

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639 South Spring Street
Los Angeles 14, California

Attorneys for Respondent

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NATIONAL LABOR RELATIONS BOARD,

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HOLLY-GENERAL COMPANY, DIVISION OF SIEGLER CORPORATION,

Respondent.

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF OF RESPONDENT HOLLY-GENERAL COMPANY, DIVISION OF SIEGLER CORPORATION

JURISDICTIONAL QUESTION

Respondent agrees that the facts of this case raise no question as to jurisdiction.

STATEMENT OF THE CASE

1. General Counsel's statement of the Board's findings of fact is erroneous in two instances, both of which are material.

(a) Page 2 of Petitioner's brief states "On January 6, 1960, after approximately 20 bargaining sessions, the Union accepted the terms of a contract proposed by respondent". The facts, as found by the trial examiner and set forth on Page 4, line 59 et seq. of the Intermediate Report and Recommended Order, and adopted by the Board are as follows: "at this meeting (February 4) the proposed contract was accepted by the membership" (Parenthesis added). There was no acceptance on January 6, 1960 (R. 62-63).

(b) Petitioner states at Page 3 of its brief "On February 12, respondent advised the union that it would not execute the contract . . ." Respondent's letter of February 12, 1960 (G.C. Exh. 2; [R. 71-72]) clearly contains an offer to execute the agreement.

The Board concluded, with the trial examiner, that respondent violated Sections 8(a)(1) and (5) of the act, holding that the acts of respondent constituted an unlawful refusal to bargain. Respondent believes a chronological statement of events will aid in clarifying the issues.

1. February 26, 1959: Charging Party Certified by Board.

2. March, 1959: Company-Union negotiations looking toward a first contract begun and continue for some 20 meetings thereafter.

3. January 6, 1960: Joint negotiation meeting.

4. January 18, 1960: Petition signed by large majority of employees, disavowing Charging Party submitted to Company.

5. January 21, 1960: Last Company offer voted on by respondent's employees, and rejected by vote (R. 58).

6. February 6, 1960: A second vote taken on Company's last offer, with only Union members voting (R. 61-63), and offer was accepted.

7. February 12, 1960: Joint meeting between Company and Union, the substance of which was notification by Union of acceptance and reply of Company, neither of which are contradicted (R. 71).

ARGUMENT

It appears too clear for serious question that as of February 12, 1960, 14 days before the 1st anniversary of the certification,

respondent was, as a matter of fact, still bargaining with the Union. Respondent's letter of that date (G. C. Exh. 2; R. 71) is clearly a bargaining proposal, made in good faith because of the intervening circumstance of the employee petition. There is no finding that respondent was not acting in good faith, as required by Section 8(a) of the act.

More important, there is no evidence that an impasse was reached with regard to the February 12 proposal of respondent, which in essence was a proposal concerning the term of the agreement, a legitimate and well recognized subject of collective bargaining. St. Joseph Stockyards Co., 2 NLRB 39. There is no evidence the Union rejected this offer, or that such rejection, if any, was ever communicated to respondent. The first notice to respondent was the filing of the charge.

Respondent contends, therefore, that it was still bargaining in good faith and no impasse existed as of the date of the filing of the Charge. If there is a failure and refusal to bargain, it lies with the charging party, who obviously abandoned its duty to bargain and sought refuge in the processes of the Board, seeking to shift the failure to bargain to respondent.

Even assuming, for the purpose of argument only, that respondent refused to bargain by its proposal of February 12, 1960, the finding of the Board that such refusal was unlawful is contrary to law.

Petitioner contends, with understandable reason, that Ray Brooks v. NLRB, 348 U.S. 96, overrules N. L. R. B. v. Globe Automatic Sprinkler, 199 F. 2d 64 (C. A. 3), for the Globe case is almost identical in fact to this proceeding, and squarely supports the action taken by respondent herein. Respondent believes that this court is able to determine whether Globe is overruled by Brooks. Respondent has been unable to find authority for this contention, and petitioner has supplied none.

Petitioner concedes that the Brooks case recognizes that what he refers to as the so-called one-year certification rule is not applicable where "unusual" circumstances are present. Respondent urges that the Brooks case pointedly avoids affirming any one-year rule as a rigid arithmetical test of good faith bargaining. Rather, the Brooks case affirms the test of "reasonable period", in the light of all of the facts obtaining, which accords with the reasoning of the Globe case.

The Globe case teaches that the facts of the instant case are "unusual circumstances" which terminated respondent's duty to bargain.

For the above reasons, it is respectfully submitted that the Board's conclusion that respondent unlawfully refused to bargain is not supported by the evidence and is contrary to law.

CONCLUSION

For the foregoing reasons, respondent respectfully submits that the petition be dismissed.

Respectfully submitted,

SWEENEY, IRWIN & FOYE

By: PETER W. IRWIN

Attorneys for Respondent
Holly-General Company,
Division of Siegler
Corporation.

No. 17304

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

HOLLY-GENERAL COMPANY,
DIVISION OF SIEGLER CORPORATION,

Respondent.

ON PETITION FOR
ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

PETITION FOR REHEARING BY RESPONDENT HOLLY-GENERAL COMPANY, DIVISION OF SIEGLER CORPORATION

SWEENEY, IRWIN & FOYE
By: PETER W. IRWIN

639 South Spring Street
Los Angeles 14, California

Attorneys for Respondent

No. 17304

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

HOLLY-GENERAL COMPANY,
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Respondent.

ON PETITION FOR
ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

PETITION FOR REHEARING BY RESPONDENT HOLLY-GENERAL COMPANY, DIVISION OF SIEGLER CORPORATION

SWEENEY, IRWIN & FOYE
By: PETER W. IRWIN

639 South Spring Street
Los Angeles 14, California

Attorneys for Respondent

No. 17304

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

HOLLY-GENERAL COMPANY,
DIVISION OF SIEGLER CORPORATION,

Respondent.

PETITION FOR REHEARING

TO THE HONORABLE:

GILBERT H. JERTBERG, Circuit Judge

M. OLIVER KOELSCH, Circuit Judge, and

JAMES M. CARTER, District Judge

Respondent, HOLLY-GENERAL COMPANY, DIVISION OF SIEGLER CORPORATION, hereby petitions for a rehearing to reconsider the judgment entered in this action on June 29, 1962, on the following grounds:

1. The case of N. L. R. B. vs. GLOBE AUTOMATIC SPRINKLER, 199 F. 2d 64 (C. A. 3) should control

the instant case.

2. The order of the Court is too broad in directing the Company to execute the contract in view of the fact that 3-1/2 years have elapsed since certification; evidence should be taken as to whether or not conditions are the same as during the initial bargaining period.

Undersigned counsel certifies that this petition is not interposed for delay and that in his judgment it is well founded.

Dated at Los Angeles, California this 26th day of July, 1962.

SWEENEY, IRWIN & FOYE

/s/ Peter W. Irwin
PETER W. IRWIN

Attorneys for HOLLY-GENERAL COMPANY, DIVISION OF SIEGLER CORPORATION, Respondent.

No. 17304

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

HOLLY-GENERAL COMPANY, DIVISION OF SIEGLER CORPORATION, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STUART ROTHMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
MARCEL MALLET-PREVOST,
Assistant General Counsel,
MELVIN POLLACK,
A. BRUMMEL,
Attorneys,
National Labor Relations Board.

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v.

HOLLY-GENERAL COMPANY, DIVISION OF SIEGLER CORPORATION, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon petition of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. Sec. 151 *et seq.*), for enforcement of its order (R. 26–28)[1] issued January 3, 1961, against respondent Holly-General Company, Division of Siegler Corporation. The Board's decision and order (R. 10–28) are reported at 129 NLRB No. 136. This Court has jurisdiction of the proceedings, the unfair labor practice having occurred at Pasadena, California, where respondent

[1] References designed "R" are to the printed record. References preceding a semicolon are to the Board's findings; succeeding references are to the supporting evidence. Relevant portions of the Act appear *infra*, pp. 11–13.

manufactures and sells heating and air-conditioning equipment (R. 11–12). No jurisdictional issue is presented.

STATEMENT OF THE CASE

I. The Board's findings of fact

The Board found that respondent failed to bargain collectively with the Union [2] by refusing to incorporate in writing and sign a collective bargaining contract which had been agreed upon within a year of the Union's certification by the Board as the bargaining representative of respondent's production and maintenance employees. The underlying facts are not in dispute and are summarized as follows:

On February 26, 1959, following a representation election at the plant, the Board certified the Union as the bargaining agent elected by a majority of respondent's production and maintenance employees (R. 12; 73–74). On January 6, 1960, after approximately 20 bargaining sessions, the Union accepted the terms of a contract proposed by respondent. The parties also agreed to add a wage reopener clause to respondent's proposed contract and then adjourned with the understanding that the contract would be submitted to the Union's members for approval or rejection (R. 13–14; 36–38, 46, 48, 51–56).

On January 18, 1960, respondent received a "decertification petition" signed by 110 employees in the bargaining unit requesting "a vote against union representation" (R. 14–15; 43, 95–97). On February 8,

[2] United Automobile, Aircraft and Agricultural Implement Workers of America, Western Region #6.

a Federal mediator notified respondent that the Union's membership had voted to accept the contract (R. 16; 46–47).[3] That same day, Employee Scharfenberg obtained the decertification petition from respondent's personnel manager and sought to file it at the Board's regional office (R. 17; 44, 51, 69–70, 65–69). A Board attorney refused to accept the petition because it was not dated and because the Union's certification was less than a year old (R. 17; 66–67). Scharfenberg returned to the plant and notified respondent's officials of the Board's rejection of the decertification petition (R. 17; 50, 67–68).[4]

On February 12, respondent advised the Union that it would not execute the contract because 60 percent of the employees in the bargaining unit had "expressed desires * * * against your continued representation" and because "the certification year expires in less than two weeks" (R. 18–19; 71–72). Respondent offered "to execute the final agreement" if a petition for an election was not filed within a reasonable time, if the Board refused to process such a petition, or if the Union won an election conducted by the Board (*ibid.*).

II. The Board's conclusion and order

On the foregoing facts, the Board affirmed the Trial Examiner's conclusion that loss of the Union's ma-

[3] The contract was rejected on January 21 at a union meeting open to all employees in the bargaining unit, but was approved on February 6 at a meeting limited to union member employees (R. 15–16; 56–59, 61–62, 99–101).

[4] Later that day, Scharfenberg prepared a second decertification petition which was circulated in the plant and subsequently filed with the Board (R. 17–18, n. 7).

jority support within a year after its certification by the Board did not relieve respondent of its duty to bargain with the Union during the certification year, and respondent therefore violated Section 8(a)(5) and (1) of the Act by refusing to execute the agreement reached with the Union during the certification year (R. 26, 19–20). The Board's order directs respondent to cease and desist from refusing to bargain with the Union and from in any like or related manner infringing upon its employees' rights under the Act. Affirmatively, the order requires respondent, upon the Union's request, to embody in a written agreement all the terms and conditions agreed to on January 6, 1960, including the wage reopener clause,[5] and to post the customary notices (R. 26–28).

ARGUMENT

The Board properly determined that respondent violated Section 8(a) (5) and (1) of the Act by refusing to honor the Union's certification before it had been in effect for a year

The Board's 1-year certification rule, which requires that, absent unusual circumstances, an employer must honor a certification based upon a Board election for a 1-year period even though the certified union is repudiated within the year by a majority of the employees in the bargaining unit, was approved by the Supreme Court in *Ray Brooks* v. *N.L.R.B.*, 348 U.S. 96. "The Court there decided that the one-year rule was within the power of the Board to make and its application was a matter within the Board's

[5] The Board corrected its order on February 16, 1961, to conform to the parties' agreement on a wage reopener clause (R. 30, *infra*, p. 10).

discretion." *Carpinteria Lemon Association* v. *N.L.R.B.*, 240 F. 2d 544, 557 (C.A. 9), cert. denied, 354 U.S. 909. See also *N.L.R.B.* v. *Henry Heide, Inc.*, 219 F. 2d 46, 47–48 (C.A. 2), cert. denied, 349 U.S. 952; *N.L.R.B.* v. *J. W. Rex Company*, 243 F. 2d 356, 360–361 (C.A. 3).

Respondent concedes that it refused within the certification year to sign a contract negotiated with the Union and approved by the Union's members. Respondent contends, however, that the Supreme Court's ruling in *Ray Brooks* is not controlling because in that case the employees' repudiation of the certified union occurred within a week of the Board election and not, as here, toward the end of the certification year. Nothing in the *Ray Brooks* opinion supports the distinction urged by respondent.[6] Rather, the Court noted that its decision had "special pertinence * * * to the period during which a second election is impossible" under Section 9(c)(3) of the Act, that is, during the year following a union's certification.[7] 348 U.S. at 104.

Respondent's further contention, that its refusal to execute the contract was warranted by the employees' rejection of the contract, is also without merit. The bargaining negotiators adjourned on January 6, 1960,

[6] The only case cited by respondent in support of its position, *N.L.R.B.* v. *Globe Automatic Sprinkler Co.*, 199 F. 2d 64 (C.A. 3), was alluded to and overruled in *Ray Brooks*, 348 U.S. at 102–104. See *N.L.R.B.* v. *J. W. Rex Company*, 243 F. 2d 356, 361, where the Third Circuit, citing *Ray Brooks*, enforced a Board order based on the 1-year certification rule.

[7] Section 9(c)(3) provides that no election shall be directed for a bargaining unit "within which, in the preceding twelve-months period, a valid election shall have been held."

with the understanding that the proposed contract would be submitted to a vote by the Union's members. Before submitting the contract to its members, the Union sought to ascertain at a meeting on January 21 whether the employees in the bargaining unit as a whole favored the contract. The rejection of the contract at this meeting was, of course, not binding upon the Union. It was no more than a factor which the Union might wish to consider in determining whether to press for acceptance of the contract by its members. Respondent, in effect, seeks unilaterally to make acceptance of the contract dependent upon the wishes of the employees in the bargaining unit. This it cannot do. *N.L.R.B.* v. *Darlington Veneer Co.,* 236 F. 2d 85, 88 (C.A. 4); *N.L.R.B.* v. *Corsicana Cotton Mills,* 178 F. 2d 344, 347 (C.A. 5); cf. *N.L.R.B.* v. *Wooster Division of Borg-Warner Cooperation,* 356 U.S. 342. As stated by the Fourth Circuit in *Darlington Veneer* (236 F. 2d at 88):

> The purpose of collective bargaining is to fix wages, hours and conditions of work by a trade agreement between the employer and his employees. *N.L.R.B.* v. *Highland Park Mfg. Co.,* 4 Cir., 110 F. 2d 632, 638. This can be done satisfactorily only if a bargaining agent is selected to represent all the employees with full power to speak in their behalf. The purpose of the statute would be largely frustrated if the results of bargaining must be submitted to a vote of the employees, with all the misunderstandings and cross currents that would inevitably arise in an election of that sort.

In sum, the purpose of the 1-year certification rule—to permit a union to negotiate a contract free from "exigent pressure to produce hothouse results or be turned out," and to assure an employer that "if he works conscientiously toward agreement, the rank and file may [not], at the last moment, repudiate their agent" (*Ray Brooks,* 348 U.S. at 100)—was accomplished by the bargaining here. Respondent itself concedes that the contract negotiated and approved by the union membership was completely acceptable to it. Its refusal within the certification year to execute the contract, in reliance upon the employees' repudiation of the Union, therefore frustrated bargaining stability. "The underlying purpose of this statute is industrial peace. To allow employers to rely on employees' rights in refusing to bargain with the formally designated union is not conducive to that end, it is inimical to it." *Ray Brooks,* 348 U.S. at 103.

For the foregoing reasons, we submit that the Board properly concluded that respondent violated Section 8(a) (5) and (1) of the Act by refusing to execute a contract negotiated within a year of the Union's certification by the Board as the collective bargaining representative of respondent's production and maintenance employees.

CONCLUSION

For the reasons stated, it is respectively submitted that the Board's order should be enforced in full.

STUART ROTHMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
MARCEL MALLET-PREVOST,
Assistant General Counsel,
MELVIN POLLACK,
A. BRUMMEL,
Attorneys,
National Labor Relations Board.

AUGUST 1961.

APPENDIX TO EXHIBITS

Number	*Identified*	*Offered*	*Received*
General Counsel's Exhibit 2	31	32	32–33
General Counsel's Exhibit 4	33	33	33
General Counsel's Exhibit 5	51	51	52
Respondent's Exhibit 1	43	45	46
Respondent's Exhibit 2	57	64	64
Respondent's Exhibit 3	58	64	64
Respondent's Exhibit 4	59	64	64

APPENDIX A

Order Correcting Decision and Order *

On January 3, 1961, the Board issued a Decision and Order [1] in the above-entitled proceeding from which there was an inadvertent omission.

It is hereby ordered that the said Decision and and Order be, and it hereby is, corrected by striking the words "clause with no-strike" from the last line of paragraph 2. (a), page 2, and from the last line of the first paragraph of Appendix A, made a part thereof, and substituting therefor the words "clause with waiver of the no-strike."

Dated, Washington, D.C., February 16, 1961.

By direction of the Board:

George A. Leet,
/s/ George A. Leet,
Associate Executive Secretary.

---

* Caption omitted.

[1] 129 NLRB No. 136.

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representative of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement as authorized in section 8(a)(3).

Unfair Labor Practices

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

Representatives and Elections

* * * * *

Sec. 9(c)(3). No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

* * * * *

(e) The Board shall have power to petition any court of appeals of the United States, * * * within any circuit * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order

of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record * * * Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the * * * Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

U.S. GOVERNMENT PRINTING OFFICE: 1961

No. 17304

United States Court of Appeals

for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

HOLLY-GENERAL COMPANY, DIVISION OF SIEGLER CORPORATION,

Respondent.

Transcript of Record

Petition for Enforcement of an Order of the National Labor Relations Board

Parker & Son, Inc., Law Printers, Los Angeles 5-23-61—6-30-61

No. 17304

United States Court of Appeals

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NATIONAL LABOR RELATIONS BOARD,

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Petition for Enforcement of an Order of the National Labor Relations Board

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

MARCEL MALLET-PREVOST,
Assistant General Counsel,
National Labor Relations Board,
Washington 25, D.C.,

Attorneys for Petitioners,

SWEENEY, IRWIN & FOYE,
PETER W. IRWIN,
639 South Spring Street,
Los Angeles 14, California,

ARNOLD, SMITH & SCHWARTZ,
JEROME SMITH,
117 West 9th Street,
Los Angeles 15, California,

Attorneys for Respondent.

GENERAL COUNSEL'S EXHIBIT 1-C

United States of America
Before the National Labor Relations Board
Twenty-First Region

Case No. 21-CA-3900

HOLLY-GENERAL COMPANY

and

UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, WESTERN REGION NO. 6

COMPLAINT AND NOTICE OF HEARING

It having been charged by United Automobile, Aircraft and Agricultural Implement Workers of America, Western Region No. 6 (herein called Union) that Holly-General Company (herein called Respondent) has been engaging in and is engaging in unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, herein called the Act, the General Counsel of the National Labor Relations Board (herein called the Board), on behalf of the Board, by the undersigned Regional Director, issues this Complaint and Notice of Hearing pursuant to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations, Series 8:

1. The charge was filed by the Union on February 16, 1960, and was served on Respondent on February 17, 1960, by registered mail.

2. Respondent, a Delaware corporation, is engaged at its Pasadena, California, plant in the manufacture of heating and air-conditioning equipment.

3. (a) Respondent, in the course and conduct of its business operations during the past calendar or fiscal year, sold products valued in excess of $50,000 to customers located outside the State of California.

(b) During the same period of time, Respondent sold products valued in excess of $50,000 to customers which, in turn, made sales outside the State of California.

(c) During the same period of time, Respondent purchased products valued in excess of $50,000 from suppliers located outside the State of California.

(d) During the same period of time, Respondent purchased products valued in excess of $50,000 from suppliers who, in turn, purchased the products from directly outside the State of California.

4. Respondent is and at all times material herein has been engaged in commerce and in business affecting commerce within the meaning of Section 2, subsections (6) and (7) of the Act.

5. Union is a labor organization within the meaning of Section 2, subsection (5) of the Act.

6. Union was certified by the Board on February 26, 1959, in Holly-General Company, a Division of the Siegler Corporation, 21-RC-5383 and 21-RC-5387, as the exclusive representative of the employees of Respondent in an appropriate unit as follows:

Included: All production and maintenance employees at the Pasadena, California, plant, including movemen,

the stockroom warehousemen, the storeroom clerk, stockroom helpers, group leaders, tow motor operators, truckdrivers, inspectors and janitors.

Excluded: Field service, engineering department, time study, production control, office clerical, and professional employees, management trainees, the plant manager secretary, guards, and supervisors as defined in the Act.

7. From on or about February 12, 1960, to the date hereof, Respondent, although requested so to do, has failed and refused, and continues to fail and refuse, to bargain collectively in good faith with the Union as the exclusive representative of all the employees included in the unit described in paragraph 6 above, with respect to wages, hours, and other terms and conditions of employment.

8. From on or about February 12, 1960, to the date hereof, Respondent has failed and refused, and continues to fail and refuse, to incorporate in writing and sign the collective bargaining agreement which had been agreed to by the Union and Respondent.

9. By the acts described in paragraphs 7 and 8 above, Respondent did engage in, and is engaging in, unfair labor practices within the meaning of Section 8(a), subsection (5) of the Act.

10. By the acts described in paragraphs 7, 8 and 9 above, and by each of said acts, Respondent did interfere with, restrain and coerce, and is interfering with, restraining and coercing, its employees in the exercise of the rights guaranteed in Section 7 of the Act, and

did thereby engage in, and is thereby engaging in, unfair labor practices within the meaning of Section 8(a), subsection (1) of the Act.

11. The activities of Respondent, described in paragraphs 7, 8, 9 and 10 above, occurring in connection with the operations of Respondent described in paragraphs 2, 3 and 4 above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states and lead to, and tend to lead to, labor disputes burdening and obstructing commerce and the free flow of commerce within the meaning of Section 2, subsections (6) and (7) of the Act.

12. The activities of Respondent, as set forth in paragraphs 7, 8, 9, 10 and 11 above, constitute unfair labor practices affecting commerce within the meaning of Section 8 (a), subsections (1) and (5), and Section 2, subsections (6) and (7) of the Act.

Please Take Notice that on the 14th day of April 1960, at 10:00 a.m., PST, in Hearing Room No. 1, on the Mezzanine Floor, 849 South Broadway, Los Angeles, California, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the above Complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony.

You are further notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, the Respondent shall file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and four

(4) copies of an answer to said Complaint within ten (10) days from the service thereof and that unless it does so all of the allegations in the Complaint shall be deemed to be admitted to be true and may be so found by the Board.

Wherefore, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the undersigned Regional Director, this 25th day of March 1960, issues this Complaint and Notice of Hearing against Holly-General Company, the Respondent herein.

/s/ RALPH E. KENNEDY,
Regional Director
National Labor Relations Board,
Twenty-First Region,
849 South Broadway,
Los Angeles 14, California.
(Address)

Admitted in Evidence May 2, 1960.

GENERAL COUNSEL'S EXHIBIT 1-H

[Title of Board and Cause.]

ANSWER

Comes Now, Holly-General Company, by and through its attorneys, Sweeney, Irwin & Foye, and Peter W. Irwin, and for answer to the complaint heretofore filed in this cause says:

1) Respondent admits the allegations of paragraph 1 of said complaint.

2) Respondent admits the allegations of paragraph 2 of said complaint.

3) Respondent admits the allegations of paragraph 3 of said complaint.

4) Respondent admits the allegations of paragraph 4 of said complaint.

5) Respondent admits the allegations of paragraph 5 of said complaint.

6) Respondent admits the allegations contained in paragraph 6 of said complaint.

7) Respondent denies the allegations of paragraph 7 of said complaint.

8) Respondent denies the allegations contained in paragraph 8 of said complaint.

9) Respondent denies the allegations contained in paragraph 9 of said complaint.

10) Respondent denies the allegations contained in paragraph 10 of said complaint.

11) Respondent denies the allegations contained in paragraph 11 of said complaint.

12) Respondent denies the allegations contained in paragraph 12 of said complaint.

Wherefore, Respondent respectfully requests the complaint herein be dismissed.

SWEENEY, IRWIN & FOYE,
/s/ By PETER W. IRWIN,
Attorney for Holly-General Company.

I certify that I have this day served copy of the foregoing Answer upon United Automobile, Aircraft and Agricultural Implement Workers of America, Western Region No. 6, and Arnold, Smith & Schwartz, 117 West 9th Street, Los Angeles 15, California, Counsel, by placing a copy of the same in the United States mail, postage prepaid, addressed to same at 117 West 9th Street, Los Angeles 15, California.

Dated: April 4, 1960.

/s/ PETER W. IRWIN.

Admitted in Evidence May 2, 1960.

[Title of Board and Cause.]

INTERMEDIATE REPORT AND RECOMMENDED ORDER

Statement of the Case

Upon a charge duly filed on February 16, 1960, by United Automobile, Aircraft and Agricultural Implement Workers of America, Western Region No. 6, herein called the Union, the General Counsel of the National Labor Relations Board, herein respectively called the General Counsel[2] and the Board, through the Regional Director for the Twenty-first Region (Los Angeles, California), issued a complaint, dated March 25, 1960, against Holly-General, Division of Siegler Corporation, herein called Respondent, alleging that Respondent had engaged in, and was engaging in, unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the National Labor Relations Act, 61 Stat. 136, as amended from time to time, herein called the Act.

Copies of the charge, the complaint, and notice of hearing thereon were duly served upon Respondent and copies of the complaint and notice of the hearing thereon were duly served upon the Union.

With respect to the unfair labor practices, the complaint alleged in substance that the Respondent since February 12, 1960, has refused to bargain collectively with the Union, although the Union had been since

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[2]This term specifically includes counsel for the General Counsel appearing at the hearing.

February 26, 1959, the statutory representative of Respondent's employees in a certain appropriate unit.

On April 5, 1960, Respondent duly filed an answer denying the commission of the unfair labor practices alleged.

Pursuant to due notice, a hearing was held on May 2, 1960, at Los Angeles, California, before the undersigned, the duly designated Trial Examiner. The General Counsel, Respondent, and the Union were represented by Counsel. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence pertinent to the issues, to argue orally at the conclusion of the taking of the evidence, and to file briefs on or before May 23, 1960. Each party has filed a brief and each has been carefully considered.

Upon the record as a whole and from his observation of the witnesses, the undersigned makes the following:

Findings of Fact

I. Respondent's business operations

Respondent, a Delaware corporation, is engaged at its Pasadena, California, plant in the manufacture of heating and air-conditioning equipment. During the calendar or fiscal year immediately preceding the issuance of the complaint herein Respondent sold finished products valued in excess of $50,000 to customers located outside the State of California. During the same period, Respondent sold finished products valued in excess of $50,000 to local customers who, in turn, made sales outside of the State of California. During

the same period, Respondent's direct out-of-state purchases of merchandise exceeded $50,000 and its indirect out-of-state purchases of merchandise exceeded $50,000.

Upon the above-admitted facts the undersigned finds that Respondent, during all times material was, and now is, engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that it will effectuate the policies of the Act for the Board to assert jurisdiction in this proceeding.

II. The labor organization involved

The Union is a labor organization admitted to membership employees of Respondent.

III. The unfair labor practices

The refusal to bargain collectively with the Union

1. The appropriate unit and the Union's majority status therein

The complaint alleged, the answer admits, and the undersigned finds, that on February 26, 1959, the Union was certified by the Board in Cases No. 21-RC-5383 and 21-RC-5387, as the exclusive representative of all Respondent's production and maintenance employees at its Pasadena, California, plant, including movemen, the stockroom warehousemen, the storeroom helpers, group leaders, tow motor operators, truckdrivers, inspectors, and janitors but excluding field service, engineering department, time study, production control, office clerical, and professional employees, management trainees, the plant manager secretary, guards, and supervisors as defined by the Act. The undersigned

further finds that since February 26, 1959, the Union has been the statutory representative of the employees in the above described appropriate unit for the purposes of collective bargaining in respect to grievances, labor disputes, rates of pay, wages, hours of employment, or other conditions of employment.

2. The refusal to bargain

(a) The pertinent facts

On January 6, 1960, after the parties had about 20 bargaining conferences, representatives of Respondent met with the Union's representatives and discussed the proposed contract which Respondent had submitted to the Union about mid-December, 1959. The terms of the proposed agreement were acceptable to the Union and its representatives so indicated at said meeting. However, there were 5 items not included in Respondent's proposal which were discussed at the aforesaid meeting. These items included the Union's request for a union security clause, for a check-off of dues clause, and for a wage increase. Respondent refused each of these demands. In lieu of an immediate wage increase, Respondent proposed a 6-month wage reopener clause which the Union accepted. The Union also agreed to waive a no-strike, no lock-out clause which Respondent had proposed. The Union also agreed to withdraw its demands for a union-security clause, for a check-off of dues clause, and to accept a 1-year contract.

With respect to the verbiage to be used in connection with the wage reopener clause, Lon Chaney, Respondent's vice-president manufacturing, testified, and the undersigned finds, as follows:

Q. At the very close of the meeting (of January 6), you or Mr. Irwin,[3] management said, "Now, with respect to details in connection with any wage reopener that you say you are willing to, there may be some provisions about who notifies whom, when, about what, but those are things that can easily be worked out"; and to that Mr. West[4] nodded his agreement, is that correct?

A. These are things that would have to be worked out, yes.

Q. Those were things that would have to be worked out and that would be worked out, am I correct?

A. Correct.

Q. And the statement that was made by management were these things that can be worked out and Mr. West nodded his agreement, am I correct?

A. Yes.

The January 6 meeting concluded with the understanding that since Respondent's proposed contract was acceptable to the Union, the details of the reopener clause would be worked out, and that Respondent's proposed contract would be submitted to the Union's members for acceptance or rejection.

On or about January 18 or 19, Jean Amman, Respondent's personnel manager, showed Chaney a three page document headed:

To Whom It May Concern

We the undersigned request a vote against union representation in the shop of Holly General plant, 875 So. Arroya Parkway, Pasadena, California.

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[3]Respondent's Counsel.

[4]The Union's assistant director.

This document, which is referred to in record as a decertification petition and which is discussed more fully below, bore the purported signatures of approximately 110 employees of Respondent.

On January 21, the Union called a meeting of all Respondents' employees—as distinguished from Union members exclusively—in order to, according to one of the Union handbills, "hear the reading of a proposed contract and [to] get all the facts [and to cast] a secret ballot for or against the proposed U.A.W.—Holly contract."

Another handbill announcing the aforesaid meeting reads, in part, as follows:

For the last few weeks UAW Representatives along with your elected Committee have been meeting with Holly General Management in an effort to reach agreement on your contract. Holly Management made what it calls it's last offer regarding your contract and it is most important that you attend a special meeting to consider this offer.

The proposed contract will be presented to you for your approval or disapproval. Hear the final positions taken by your employer and the UAW Committee at the January 6 meeting.

Get all of the facts by being present and casting your secret ballot vote for or against the proposed contract. Ernest West, Region 6, UAW, Assistant Dir., who took part in final negotiations will be present to give his views concerning the proposed contract agreement.

A democratic Union must be guided by the desires of its membership. Do not disenfranchise yourself by being absent from this important meeting!

The Union submitted to those attending the meeting referred to immediately above, Respondent's proposed contract. The persons attending the meeting voted to reject Respondent's proposal.

In the latter part of January or in the fore part of February members of management met and discussed among themselves, to quote from Chaney's testimony, "what our alternates might be in view of [the Union's] acceptance of the contract, in view of the [so-called decertification] petition we had received."

On February 4, the Union held a membership meeting for the purpose of voting to accept or reject Respondent's proposed contract. The handbill announcing this meeting reads, in part, as follows:

A Meeting Shall be Held Tomorrow for the Purpose of Voting to Accept or Reject the Union Contract With the Holly General Company.

Those Eligible to Vote on the Proposed U.A.W. Contract are Employees Who Signed Membership Cards. No Other Holly General Employees Than Those Who Signed the U.A.W. Membership Card Will be Eligible to Cast a Vote on the Accepting or Rejecting of This Contract.

At this meeting the proposed contract was accepted by the membership.

On or about February 8, the Federal Mediator who had been assigned to the then pending controversy between Respondent and the Union, informed Chaney that the Union's membership had voted to accept Respondent's proposed contract.

On February 8, Employee Vince Scharfenberg went to Amman's office and asked for the so-called decertification petition because he wanted to file it with the Labor Board. Upon receiving said petition from Amman, Scharfenberg informed Charles Burton, his immediate supervisor, that he desired to leave the plant to attend to some business.[5] Burton told Scharfenberg, that he may leave the plant provided he "clocked out." Scharfenberg after clocking out, went to the Board's Twenty-first Regional offices and submitted the decertification petition to a Board attorney or a Field Examiner for filing and processing. After some discussion with the aforesaid Board agent, Scharfenberg and he conferred with a Board attorney, who informed Scharfenberg that the decertification petition could not be processed because it bore no date and for the further reason that the Union's certification year would not expire until after February 27.[6]

Upon returning to the plant, after his visit to the Board's offices, Scharfenberg informed Chaney and Amman that the Board would not accept the decertification petition because it was undated and untimely.[7]

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[5]Scharfenberg testified, and the undersigned finds, that he told Burton "the nature of the business."

[6]The Union was certified on February 26, 1959. Section 9(c)(3) of the Act provides, in pertinent part:

> No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

[7]Later that day, February 8, Scharfenberg drafted

Under date of February 12, Chaney wrote West as follows:

Confirming our representative's statement during the meeting of February 12, 1960, at which meeting we were requested to reduce the contract to its final form and execute it, and so that there will be no misunderstanding, we wish to re-state the Company's position.

As we told you, within the last several days, we have received a petition signed by more than sixty percent of our employees in the bargaining unit requesting that an election be held to determine the question of employee representation. We are further informed that one or more employees went to the Board to initiate such an election, and that they were told that they were premature.

In view of the fact that the certification year expires in less than two weeks, and in view of the expressed desires of our employees against your continued representation, which expression was contained in the petition above referred to and the signatures on which we have verified, it appears to us that to reduce our agreement to final form and execute it would operate to deprive our employees of their rights to an election to determine the question of continued representation.

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another decertification petition and had it typed by Amman's secretary. This second petition was circulated in the plant by Employee Joe Pauro. The record indicates that the second petition was filed with the Board but the record is silent as to what action, if any, the Board has taken with respect thereto.

We therefore have offered, and renew our offer, to execute the final agreement, such agreement to take effect upon the happening of any of the following events:

1. A reasonable time has elapsed from the earliest date at which a petition for election could be filed and no such petition is filed, or

2. A petition for election is filed within such time and the petition is dismissed by the Board, or

3. A petition is filed and an election held with results favorable to your organization.

This proposal was made and is renewed in the sincere belief that in view of all of the circumstances that it affords the greatest protection to yourselves, to our employees, and to the Company.

(b) Concluding findings

The Board has held, with the approval of the Supreme Court,[8] that a certification based upon a Board-conducted election must be honored for a reasonable period—ordinarily 1 year—in the absence of unusual cirstances.

The record in this case is convincingly clear, and the undersigned finds, that after the Union members had voted to accept Respondent's proposed contract, Respondent would have executed it, after the verbiage had been agreed upon with respect to the reopener clause, had not Respondent been confronted with the employees' decertification petition. In other words, Respondent refused to execute its own contract proposal because it bowed to its employees' "change of mind" regarding

[8]Ray Brooks v. N. L. R. B., 348 U.S. 96.

their union affiliations. The choice selected by Respondent was without the pale of the law, since, as the cases hold,[9] the "change of mind" by employees within the certification year is not the type of unusual circumstances warranting suspension of the 1-year rule. Respondent, therefore, must be directed to reverse its position to conform to the requirements of law and be ordered to embody in a written agreement all the contractual terms and conditions to which it agreed at the January 6, 1960 meeting with the Union, including a 6-month reopener clause with no-strike no-lockout provisions.

Upon the entire record in the case, the undersigned finds that Respondent's refusal, since February 12, 1960, to bargain collectively with the Union, is violative of Section 8(a)(5) and (1) of the Act.

IV. The effect of the unfair labor practices upon commerce

The activities of Respondent set forth in Section III above, occurring in connection with the business operations of Respondent described in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and such of them as have been found to constitute unfair labor practices, tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

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[9]See, for example, Ray Brooks v. N. L. R. B., supra; Peninsula Asphalt & Construction Co., 127 NLRB #20; Bluefield Produce & Provision Company, 117 NLRB 1660.

V. The remedy

Having found that Respondent has engaged in unfair labor practices, violative of Section 8(a)(1) and (5) of the Act, it will be recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that if Respondent had not been confronted with the aforementioned decertification petition it would have executed the written proposals it submitted to the Union in December, 1959, which proposals the Union agreed to accept on January 6, 1960, after the verbiage of a reopener clause had been agreed to, the undersigned recommends that upon the Union's request, Respondent embody in a written agreement all the contractual terms and conditions it and the Union agreed to on January 6, 1960, including a 6-month reopener clause with no-strike no-lockout provisons.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, the undersigned makes the following:

Conclusions of Law

1. The Union is, and during all times material was, a labor organization within the meaning of Section 2(5) of the Act.

2. Respondent is engaged in, and during all times material was engaged in, commerce within the meaning of Section 2(6) and (7) of the Act.

3. All Respondent's production and maintenance employees at its Pasadena, California, plant, including movemen, the storeroom clerk, stockroom helpers, group

leaders, tow motor operators, truckdrivers, inspectors, and janitors but excluding field service, engineering department, time study, production control, office clerical, and professional employees, management trainees, the plant manager secretary, guards, and supervisors as defined by the Act, constitute, and during all times material constituted a unit appropriate for the purposes of collective bargaining within the meaning of Section 9-(b) of the Act.

4. The Union was on February 26, 1959, and at all times thereafter has been, the statutory representative of all the employees in the above described appropriate unit, for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on February 12, 1960, and at all times thereafter, to bargain collectively with the above-named labor organization, as the statutory representative of the employees in the above-described appropriate unit, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed by Section 7 of the Act and has thereby engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

Recommendations

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the record as a whole, the undersigned recommends that Holly-General Company, Division of Siegler Corporation, Pasadena, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with the Union as the statutory representative of the employees in the above-described appropriate unit with respect to grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment;

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which the undersigned finds will effectuate the policies of the Act.

(a) Upon the request of the Union embody in a written agreement all the contractual terms and conditions agreed to between it and the Union on January 6, 1960, including a 6-month reopener clause with no-strike no-lockout provisions;

(b) Post at its plant in Pasadena, California, copies of the notice attached hereto marked "Appendix A." Copies of said notice, to be furnished by the Regional Director for the Twenty-first Region, shall, after being duly signed by Respondent's representative, be posted for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to em-

ployees customarily are posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(c) Notify the Regional Director for the Twenty-first Region, in writing, within twenty (20) days from the receipt of this Intermediate Report and Recommended Order what steps Respondent has taken to comply therewith.

It is further recommended that unless within twenty (20) days from the date of the receipt of this Intermediate Report and Recommended Order the Respondent notifies said Regional Director that it will comply with the foregoing recommendations, the Board issue an order requiring Respondent to take the aforesaid action.

Dated this 1 day of August 1960.

/s/ HOWARD MYERS,
Trial Examiners.

Appendix A

Notice to All Employees, Pursuant to the Recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We Will, upon the request of United Automobile, Aircraft and Agricultural Implement Workers of America, Western Region No. 6, embody in a written agreement all the contractual terms and conditions agreed to by us and the above-named labor organization on January 6, 1960, including a 6-month reopener

clause with no-strike no-lockout provision. The bargaining unit is:

All Respondent's production and maintenance employees at its Pasadena, California plant, including movemen, the storeroom clerk, stockroom helpers, group leaders, tow motor operators, truckdrivers, inspectors, and janitors but excluding field service, engineering department, time study, production control, office clerical, and professional employees, management trainees, the plant manager secretary, guards, and supervisors as defined by the Act.

All our employees are free to become or remain members of the above-named Union or any other labor organization. We will not discriminate in regard to hire or tenure of employment or any term or condition of employment against any employee because of membership in or activity on behalf of any labor organization.

Holly-General Company,
Division of Siegler Corporation,
(Employer)

Dated .....By .....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

[Title of Board and Cause.]

DECISION AND ORDER

On August 1, 1960, Trial Examiner Howard Myers issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report and a brief in support thereof.

Pursuant to the provisions of Section 3 (b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief, and the entire record in this case, and hereby adopts the findings, conclusions and recommendations of the Trial Examiner.

Order

Upon the entire record in this case and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Holly-General Company, Division of Siegler Corporation, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates

of pay, wages, hours of employment and other terms and conditions of employment with United Aircraft and Agricultural Implement Workers of America, Western Region No. 6, as the statutory representative of the employees in the following appropriate unit:

All Respondent's production and maintenance employees at its Pasadena, California, plant, including movemen, the stockroom warehousemen, the storeroom helpers, group leaders, tow motor operators, truck-drivers, inspectors, and janitors, but excluding field service, engineering department, time study, production control, office clerical, and professional employees, management trainees, the plant manager secretary, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request of the Union embody in a written agreement all the contractual terms and conditions agreed to between it and the Union on January 6, 1960, including a 6-month reopener clause with no-strike no-lockout provisions;

(b) Post at its plant in Pasadena, California, copies of the notice attached to the Intermediate Report marked "Appendix A."[1] Copies of said notice, to be

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[1]This notice shall be amended by substituting for the words "The Recommendations of a Trial Examiner" the words "A Decision and Order." In the event that

furnished by the Regional Director for the Twenty-first Region, shall after being duly signed by Respondent's representative, be posted for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees customarily are posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(c) Notify the Regional Director for the Twenty-first Region in writing, within ten (10) days from the date of this Order, what steps it has taken to comply therewith.

Dated, Washington, D. C. Jan. 3, 1961.

[Seal]

BOYD LEEDOM, Chairman,
JOSEPH ALTON JENKINS, Member,
ARTHUR A. KIMBALL, Member,
NATIONAL LABOR RELATIONS BOARD,

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this order is enforced by a decree of a United States Court of Appeals, the notice shall be further amended by substituting for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

United States Court of Appeals
for the Ninth Circuit

No. 17304

NATIONAL LABOR RELATIONS BOARD,

Petitoner,

v.

HOLLY-GENERAL COMPANY, DIVISION OF SIEGLER CORPORATION,

Respondent.

CERTIFICATE OF THE NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 102.116, Rules and Regulations of the National Labor Relations Board —Series 8, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of a proceeding had before said Board, and known upon its records as Case No. 21-CA-3900. Such transcript includes the pleadings and testimony and evidence upon which the Order of the Board in said proceeding was entered, and includes also the findings and Order of the Board.

Fully enumerated, said documents attached hereto are as follows:

1. Stenographic transcript of testimony taken before Trial Examiner Howard Myers on May 2, 1960, together with all exhibits introduced in evidence.

2. Trial Examiner's Intermediate Report And Recommended Order issued August 1, 1960, (annexed to item, 4, hereof).

3. Respondent's Exceptions To The Intermediate Report and Recommended Order, received August 24, 1960.

4. Copy of Decision And Order of the National Labor Relations Board dated January 3, 1961.

5. Copy of Order Correcting Decision And Order dated February 16, 1961.

In Testimony Whereof, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 21st day of April, 1961.

/s/ OGDEN W. FIELDS,
Executive Secretary,
National Labor Relations Board.

[Seal]

Before the National Labor Relations Board
Twenty-First Region

No. 21-CA-3900

HOLLY GENERAL COMPANY,
Respondent,

and

UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, WESTERN REGION No. 6
Charging Party,

Room No. 2, 849 South Broadway, Los Angeles, California, Monday, May 2, 1960.

Pursuant to notice, the above-entitled matter came on for hearing at 10:00 o'clock a.m.

Before: Howard Myers, Trial Examiner.

Appearances: E. Don Wilson and Laurence D. Steinsapir, 849 South Broadway, Los Angeles, California, appearing on behalf of the General Counsel of the National Labor Relations Board.

Arnold, Smith & Schwartz, By: Jerome Smith, 117 West 9th Street, Los Angeles 15, Cailifornia, appearing on behalf of the Charging Party.

Sweeney, Irwin & Foye, By: Peter W. Irwin, 639 South Spring Street, Los Angeles 14, California, appearing on behalf of the Respondent. [1]*

PROCEEDINGS

* * * * *

Mr. Wilson: I ask that this be marked as General Counsel's Exhibit 2 for identification.

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*Page numbers appearing at top of page of Original Transcript of Record.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 2 for identification.)

Mr. Wilson: Mr. Irwin, I show you General Counsel's Exhibit 2 for identification and propose the stipulation that it is the original of a letter sent through the mail on or about February 12, 1960, by Mr. L. R. Chaney, vice-president of Respondent, directed to Mr. E. West of the U. A. W., the charging party herein, and that it was received by Mr. West in the regular course of mail. [7]

Mr. Irwin: I have no objection.

Mr. Wilson: Do you so stipulate?

Mr. Irwin: So stipulate, yes.

Mr. Wilson: I offer—

Trial Examiner: Do you so stipulate, Mr. Smith?

Mr. Smith: Yes, I do. I wonder, does it carry with it the understanding then that Mr. Chaney is in fact the vice-president. I would like to add that to the stipulation.

Mr. Irwin: Yes.

Mr. Smith: So stipulated.

Mr. Wilson: And I accept the stipulation as amended.

Trial Examiner: Very well.

Mr. Wilson: I offer General Counsel's Exhibit 2 for identification in evidence.

Trial Examiner: Any objections?

Mr. Irwin: No objection.

Mr. Smith: No objection.

Trial Examiner: There being no objection, the paper is received into evidence, and I will ask the re-

porter to kindly mark it as General Counsel's Exhibit No. 2.

(The document heretofore marked General Counsel's Exhibit No. 2 for identification was received in evidence.) [8]

* * * * *

Mr. Wilson: I ask that this be marked as General Counsel's Exhibit 4 for identification.

(Thereupon the document above referred to was marked General Counsel's Exhibit 4 for identification.) [11]

Mr. Wilson: I propose the stipulation that General Counsel's Exhibit 4 for identification is the certification of the Union as the bargaining representative in Case No. 21-RC-5383 and 21-RC-5387, said certification being dated February 26, 1959.

Do you so stipulate, Mr. Irwin?

Mr. Irwin: So stipulated.

Mr. Wilson: And Mr. Smith?

Mr. Smith: So stipulated.

Mr. Wilson: I so stipulate.

I offer General Counsel's Exhibit 4 for identification into evidence.

Trial Examiner: Any objection?

Mr. Irwin: No objection.

Mr. Smith: No objection.

Trial Examiner: There being no objection, the paper is received into evidence, and I will ask the reporter to kindly mark it as General Counsel's Exhibit No. 4.

(The document heretofore marked General Counsel's Exhibit No. 4 for identification was received in evidence.) [12]

* * * * *

Mr. Wilson: At the request of Respondent, I am proposing the following stipulation:

That on Februry 29, 1960, in Case No. 21-RD-483, that a decertification petition was filed by an individual named V. A. Wolks, W-o-l-k-s, and the petition was supported by 30 percent or more of the employees in the unit, the unit being substantially the same as that involved in there proceedings. [13]

* * * * *

Mr. Irwin: Well, in that connection, Mr. Myers, in connection with Mr. Wilson's statement, certainly the dates bear out the fact that the petition was filed after the employer's alleged refusal to bargain.

Now, mere refusal to bargain is not violation of the Act. It has to be unlawful refusal. Obviously the condition concerning representation is a matter of defense, and we think therefore, highly material on that basis. [15]

* * * * *

Mr. Wilson: As I understand it, the stipulation is that on February 29, 1960, a petition for decertification of the union involved in this proceeding as the bargaining representative of the employees of the Respondent was filed, and was given the case No. 21-RD-483 and attached to that petition was a list of names.

Mr. Smith: So stipulated.

Mr. Irwin: So stipulated.

Trial Examiner: And you?

Mr. Wilson: I so stipulate. [18]

* * * * *

Mr. Irwin: Well, the question, if there was a refusal to bargain in fact. There is an additional ques-

tion of whether it is an unlawful refusal to bargain. It is the respondent's suggestion that this petition will be connected we believe by the evidence. It is respondent's contention that the question of representation is material, representation by the union, continued representation of the people in the shop is material and enters into the position taken by [19] the employer.

Trial Examiner: You say that you will connect it up?

Mr. Irwin: Yes.

* * * * *

LON CHANEY,

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Trial Examiner: What is your name, sir?

The Witness: Lon Chaney.

Trial Examiner: Will you kindly spell your last name?

The Witness: C-h-a-n-e-y.

Trial Examiner: Lawrence?

The Witness: Lon, L-o-n.

Trial Examiner: Where do you live, sir?

The Witness: I live at 12354 Hesby, North Hollywood.

Trial Examiner: You may be seated.

Mr. Irwin, you may proceed with the examination of Mr. Chaney who has been duly sworn.

Mr. Irwin: Thank you, sir. [20]

(Testimony of Lon Chaney.)

Direct Examination

Q. (By Mr. Irwin): By whom are you employed, Mr. Chaney?

A. By Holly-General Company, a division of Siegler Corporation.

Q. In what capacity?

A. Vice-president of manufacturing.

* * * * *

Q. Mr. Chaney, do you know of your own knowledge whether or not there have been certain negotiations with the U. A. W. at Holly-General for the past year, approximately?

A. Yes. I sat in, and on negotiations with the exception of one meeting.

Q. Do you recall whether or not you had any meetings with the union in the month of January, 1960?

A. Let's see. I believe we had a meeting January 6th, as I recall the date.

Q. Who was present at this meeting, if you recall?

A. Mr. West, Mr. Garriga, yourself, Mrs. Amman and myself, and I don't recall any of the committee members there at the time.

Mr. Wilson: May I have the spelling of Mrs. Amman?

The Witness: A-m-m-a-n. [21]

Q. (By Mr. Wilson): Do you recall at the present time, Mr. Chaney, what transpired at that meeting?

A. At this meeting Mr. Garriga and Mr. West were new as far as being the union representatives. We had been dealing with a Mr. Slater.

(Testimony of Lon Chaney.)

At the time Mr. Garriga and Mr. West came into the meeting, we were somewhat surprised inasmuch as they evidently had not been filled in on what had transpired prior to the meeting with Slater.

Mr. Smith: I move that the last be stricken as a conclusion.

Trial Examiner: Strike it out.

Will the reporter please read the question for the witness?

(Record read.)

Mr. Irwin: I will rephrase the question.

Trial Examiner: All right.

Q. (By Mr. Irwin): Had Mr. West and Mr. Garriga been in any previous negotiations?

A. No.

Q. Had there been any union representative at any previous negotiation?

A. Slater had been there. Now, I should maybe answer that again. I believe Mr. Garriga was there at one of the first meeting that we had with Mr. Slater. I am not positive [22] about that, however.

Q. About how many meetings did you have altogether?

A. It is really difficult to say inasmuch as they took place over a period of a year. I would guess somewhere around 20, possibly. Maybe it was more than that.

Trial Examiner: That is your best recollection?

The Witness: Yes.

Trial Examiner: At the present time.

(Testimony of Lon Chaney.)

Q. (By Mr. Irwin): Now, in the month of December, Mr. Chaney, do you know whether or not—

Trial Examiner: 1958.

Q. (By Mr. Irwin): This would be 1959, the month of December. Do you know whether or not the company had given to the union representatives a written draft of all agreements to that date?

A. Yes. Some time in mid December this was submitted to Mr. Slater as well as the committee members, a formal proposal for a contract.

Q. Now, on this meeting on January 6, Mr. Chaney, did either Mr. West or Mr. Garriaga have a copy of this typewritten draft with them?

A. No. At least not to my knowledge, inasmuch as I did have to give them a copy of the formal proposal.

Q. Now, do you recall what subjects were discussed at that meeting on January 6, Mr. Chaney?

A. Well, there were several subjects discussed: Union [23] security was one. Check-off, wages, a rather heated debate. A wage reopener clause. I believe there was one other, but I don't recall it right offhand.

Q. Do you recall whether or not the duration of the agreement was discussed?

A. Yes. That was the other. Duration of the agreement was the other.

Q. With respect to union security, check-off of dues, wages and duration, do you recall whether or not agreement was reached at that meeting on those items?

Mr. Smith: I will object to that. It calls for a conclusion. The witness can just testify as to what was said.

(Testimony of Lon Chaney.)

Trial Examiner: Sustained.

The Witness: Should I answer that?

Mr. Irwin: I beg your pardon?

Trial Examiner: I will sustain it.

Q. (By Mr. Irwin): What if anything was said by the union representatives with respect to the company proposals on union security, check-off, wages and duration of the agreement?

A. Well, on the items you mentioned there, it was my understanding, after quite lengthy discussion, that agreement had been reached on those four items.

Q. How about with respect to the wage reopener?

A. The wage reopener was something that was discussed at [24] that time. However, it was not settled upon. There were several things that were still left open on the wage reopener clause.

Q. What were those, if you recall?

A. Well, as an example, who would be the person to notify and when.

Mr. Smith: I am going to object to the question and ask that the partial answer be stricken on the ground that the answer is not going to be meaningful. He is giving conclusions and not recounting what was said.

Trial Examiner: Do you want him to repeat everything he now remembers of what transpired at that meeting?

Mr. Smith: The thing that bothers me about this, Mr. Trial Examiner, he was asked the question what was it that was not resolved. We don't know whether he is giving what was said or some natural reservations

(Testimony of Lon Chaney.)

of his that weren't discussed at all, and I think this is a highly important question. A question of whether it was resolved is going to hinge on what was said, and it is very important as to what was said about wage reopeners.

Mr. Irwin: I will go through it step by step.

Trial Examiner: Very well, sir. I will sustain the objection.

Q. (By Mr. Irwin): What did the company state with respect to this wage reopener clause? [25]

A. Well, the company said that it felt—

Mr. Smith: This means, Mr. Chaney is the spokesman.

Q. (By Mr. Irwin): Do you recall who stated this?

A. Well, I think in part myself and in part Mr. Irwin made the statements.

Q. What was said, if you recall?

A. Well, to begin with, the time, that is the time element, as far as one wage reopener was discussed, and I think it was agreed upon that it would be in a period of six months.

There were other things that were brought up, as I mentioned, that were discussed, but were not agreed upon.

Mr. Wilson: I move to strike that latter part, Mr. Trial Examiner.

Trial Examiner: Mr. Chaney, all you are supposed to do is tell us what you remember of what was said—

The Witness: All right, yes, sir.

Trial Examiner: —by each party to the conference.

(Testimony of Lon Chaney.)

The Witness: Mr. Irwin brought up the fact that this meeting, at this meeting that there were several things that would have to be agreed upon in a wage reopener clause such as who and when or who notifies—I beg your pardon—and how long to bargain, and if an agreement is not reached, in view of the no strike no lock out clause, what is the action by either party; and I believe that pretty well covers it. [26]

Trial Examiner: What did the union say with respect to the reopener?

The Witness: Well, the union was in favor of a reopener clause.

Trial Examiner: What did they say? Were certain propositions proposed by Mr. Irwin?

The Witness: Yes, I think at this point we were in the process of breaking off the meeting or breaking the meeting up, and I think Garriga and or at least Mr. West nodded his head that we could reach agreement on these points.

Q. (By Mr. Irwin): Did the meeting break up about that time? A. Yes.

Q. Mr. Chaney, at any time in January of 1960, did you see a petition signed by certain of your employees?

A. Yes. There was a petition handed to the Personnnel Department somewhere around the 18th or 19th of January which I saw.

Trial Examiner: What year?

The Witness: 1960.

Q. (By Mr. Irwin): Do you know approximately how many signatures there were on that petition?

(Testimony of Lon Chaney.)

Mr. Smith: I object.

Mr. Wilson: I object to that question upon the grounds of irrelevancy and immateriality.

Mr. Smith: I will add the objection that it is not the [27] best evidence. The document itself should be presented.

Trial Examiner: What about that, Mr. Irwin?

Mr. Irwin: I am not asking about the contents of it.

Trial Examiner: You are asking him to describe it.

Mr. Wilson: How many names are on it?

Mr. Irwin: I am just asking how many names are on it.

Mr. Wilson: I renew my objection.

Trial Examiner: Isn't the document itself the best evidence.

I can understand your position, Mr. Irwin, but perhaps if you counsel have a conference, maybe you can come up with some stipulation.

I assume that you do not want to show this list of names of persons on there to the union's counsel, is that right?

Mr. Irwin: That is correct. I prefer not to.

Trial Examiner: And so that is why I suggest that you perhaps can arrive at some stipulation with Mr. Smith and Mr. Wilson and his associates.

Mr. Wilson: Of course, I would like to point out, Mr. Trial Examiner, that even with respect to the list itself, while an objection was placed on the grounds that this witness' testimony as to the number of names on the list wouldn't be the best evidence, and that the document speaks for itself, there would be the further

(Testimony of Lon Chaney.)

objection, and I think [28] obviously well grounded, that it is irrelevant and immaterial whether they got a list from some employee or petition from some employees on January 18th, 1960 or not.

Trial Examiner: That is all right. We will take that up at a later date.

In the meantime, do you think you can get together? I suggest a little conference between counsel.

You may step down temporarily, Mr. Chaney.

We will be in recess.

(Short recess.)

Trial Examiner: Gentlemen, are you ready to proceed?

Mr. Irwin: Yes, Mr. Myers.

Trial Examiner: Proceed.

Mr. Irwin: I will ask the reporter to mark this as Respondent's Exhibit 1.

(Thereupon the document above referred to was marked Respondent's Exhibit No. 1 for identification.)

Mr. Irwin: I would like to remark in the record that the exhibit has been exhibited to opposing counsel.

Q. (By Mr. Irwin): Mr. Chaney, I am going to show you a document consisting of two pages with some typewriting on it, and what appears to be signatures with a blue cover and a blue back on it.

I am going to ask you if you have seen that before, sir? [29]

A. Yes.

Q. When was the first time you saw it?

A. It was January 18th or 19th, 1960.

(Testimony of Lon Chaney.)

Q. Where did you get it when you saw it?

A. The Personnel Manager showed this to me.

Mr. Smith: I am sorry, I didn't hear the answer.

The Witness: I said the Personnel Manager showed it to me.

Q. (By Mr. Irwin): I show you now General Counsel's Exhibit 2, Mr. Chaney, which is a letter dated February 12 over your signature, and in the second paragraph of the first page I will ask you whether or not Respondent's 1 is the petition referred to in that letter? A. Yes.

Mr. Irwin: Mr. Wilson and Mr. Smith, will you stipulate that Respondent's 1 is not the same petition as in Board's file No.—

Mr. Wilson: 21-RD-483.

Mr. Irwin: Yes.

Mr. Wilson: I so stipulate.

Mr. Smith: So stipulated.

Trial Examiner: And you, Mr. Irwin.

Mr. Irwin: I will so stipulate.

Trial Examiner: Thank you, gentlemen.

Q. (By Mr. Irwin): Now, what if anything, did you do [30] after you saw this petition, Mr. Chaney?

A. Well, I gave it back to Mrs. Amman.

Trial Examiner: Who is she?

The Witness: Pardon me?

Trial Examiner: Who is she?

The Witness: She is the Personnel Manager, and requested that she have the names verified against the personnel file or W-2 form.

Q. (By Mr. Irwin): Mr. Chaney, were you present

(Testimony of Lon Chaney.)

at a meeting, negotiating meeting with the union on February 12, 1960?

A. No, I was not.

Q. Were you present at any meeting held by members of management with respect to the February 12 meeting, that is a meeting that took place before February 12th?

A. As far as that, prior to that date, yes. We had a meeting. It was either the latter part of January or very first part of February at which time we discussed what our alternates might be in view of union acceptance of the contract, in view of the petition that we had received.

Mr. Wilson: Could we find out who was present?

Q. (By Mr. Irwin): Who was present at this meeting?

A. Mr. Miller, myself, Mrs. Amman and yourself, Mr. Irwin.

Q. Mr. Chaney, if you know, was Respondent's 1, that is this petition, is that the sole reason for the position [31] taken by the company at the February 12th meeting?

A. Yes, definitely.

Mr. Irwin: I have no further questions.

Trial Examiner: Has the General Counsel any questions to ask this witness?

Mr. Wilson: Just a moment, please, sir.

Mr. Smith: Was Respondent's Exhibit 1 offered into evidence?

Mr. Irwin: I beg your pardon. I move that Respondent's Exhibit 1 be received into evidence.

(Testimony of Lon Chaney.)

Trial Examiner: Any objection?

Mr. Wilson: I object to it on the grounds it is immaterial and irrelevant.

Mr. Smith: We join in that objection.

Trial Examiner: I will overrule the objection and receive the document into evidence, and I will ask the reporter to kindly mark it as Respondent's Exhibit 1.

(The document heretofore marked Respondent's Exhibit 1 for identification was received in evidence.)

Cross-Examination [32]

* * * * *

Q. On January 6, 1960, did not either Mr. West or Mr. [39] Garriga or both of them tell you that they were going to present your offer of the contract to their membership for approval? A. Yes.

Q. When did you first learn that the membership had accepted, voted to accept your proposal?

A. The union had two meetings in that case. One I—

Q. Well, without respect to the two meetings right now? A. Yes. I would say.

Q. When did you first learn?

A. That they accepted the contract?

Q. Yes.

A. Or accepted the proposal?

Q. Right.

A. I believe it was from Mr. Ferguson. I think it was February 8, I believe.

Trial Examiner: Of this year?

The Witness: Of this year, yes.

(Testimony of Lon Chaney.)

Q. (By Mr. Wilson): And that was Mr. Ferguson, the Federal Mediator? A. Yes. [40]

* * * * *

Further Cross-Examination [42]

* * * * *

Q. (By Mr. Smith): Now, we have that taking place. In any event, the union did agree to the six-month wage reopener with waiver of no strike no lock-out clause, is that correct? Some time in the meeting the union representative said yes.

A. Yes, and then at that point was where Mr. Irwin brought up these other problems, related problems, as far as working [50] out the balance of the wage reopener clause.

Q. Now, this was at the close of the meeting or very near thereto, you stated, is that correct?

A. Yes.

Q. Now, tell me again what Mr. Irwin said about these related points.

A. Well, Mr. Irwin brought up the fact that there were several items which would have to be worked out, one of which being, who would open, who would notify.

The second one being how long we would bargain, and the third one being if no agreement was reached, what would be the action of either party.

Q. Now, were these treated by you just as language problems, the way that this would be drawn up in the contract?

A. Well, I think Mr. Irwin also stated at that point that he felt these were something that could be worked

(Testimony of Lon Chaney.)

out, and this is when I referred to Mr. West nodding, at that time, consent.

Q. So at that point it was your understanding that an agreement had been reached?

A. It was not my understanding that an agreement had been reached. It was my understanding that an agreement could be reached.

Q. On the language and on these details concerning this last issue, is that correct? [51]

A. Yes. On the language and the details, how it is going to work and so on.

Trial Examiner: The mechanics?

The Witness: The mechanics.

Q. (By Mr. Smith): Now, you knew, did you not, that the union was taking the company's proposed contract to its membership for the necessary membership vote?

A. Yes.

Q. Was any later meeting set up to work out these remaining details?

A. No, because at this point was when Mr. West said that he certainly would not, could not recommend the contract to the membership.

Q. Well, his recommendation or not, it was going to be up to the membership, is that correct?

A. Yes.

Q. That was the stipulation, it would be presented to the membership?

A. Oh, yes.

Q. Now, am I correct in my conclusion that the only reason that a contract, the contract with this union

(Testimony of Lon Chaney.)

has not been signed was because of the conditions and stipulations referred to in your letter of February 12, 1960?

Trial Examiner: Do you want to see the letter?

The Witness: Yes. It is right here. [52]

Trial Examiner: Do you have it before you?

The Witness: Yes.

Yes.

Mr. Smith: That is all.

Trial Examiner: You say "yes" to the question propounded, is that right?

The Witness: Yes.

* * * * *

Cross-Examination (Continued) [53]

* * * * *

Some time around the middle of February you heard that some employees or somebody from your company went to the National Labor Relations Board to file a petition for decertification, is that right?

A. Somewhere in the middle of January?

Q. In the middle of February.

A. Oh, the middle of February, yes.

Q. And you learned that they came down here to the National Labor Relations Board and were told, among other things, that the petition was not in proper form? A. Yes.

Q. And that it was untimely or something of the sort? A. Right.

Q. And they didn't file any petition?

A. That is correct.

* * * * *

(Testimony of Lon Chaney.)

Q. Who was the fellow that brought the petition down?

A. Vince Scharfenberg.

Trial Examiner: Who?

The Witness: Vince Scharfenberg. [55]

* * * * *

Trial Examiner: When he came back, to whom did he speak?

The Witness: He talked to Mrs. Amman and myself.

Trial Examiner: Did he have any documents at that time; did he show you any printed forms?

The Witness: No. I don't think he had any printed forms at all.

Q. (By Mr. Wilson): What did he show you?

A. I don't think he showed me anything. I think he merely told me what had been told him.

Q. What did he tell you?

A. What I previously answered, that the NLRB or whoever [57] he talked to down here had told him that the petition was not only untimely, but it was an incorrect form.

Trial Examiner: What petition was that?

The Witness: The petition that was presented here.

Trial Examiner: Respondent's Exhibit No. 1?

The Witness: Yes.

Q. (By Mr. Wilson): Well, after Respondent's petition or Exhibit No. 1 was given to your Personnel office, it was then given to you, and then in the latter part of January you and other representatives of man-

(Testimony of Lon Chaney.)

agement got together and discussed this petition. What did you do then with the petition?

A. Well, as I mentioned previously, I gave it back to the Personnel Manager to have the signatures verified.

Q. Yes, and then what happened to it?

A. I think it was put into the file for safe keeping.

Q. Well, it may be—

Trial Examiner: How did this man Scharfenberg get this paper?

The Witness: He asked Gene Amma for it. [58]

* * * * *

Mr. Wilson: May I have this marked as General Counsel's Exhibit next in order.

(Thereupon the document above referred to was marked General Counsel's Exhibit 5 for identification.)

Q. (By Mr. Wilson): I show you General Counsel's Exhibit 5 for identification and ask you if that is a copy of the written proposal made by your company to the union at least on January 6, 1960?

Trial Examiner: What do you mean by at least? Do you [66] mean on or prior?

Q. (By Mr. Wilson): Possibly it was done on or prior to January 6, 1960.

A. This looks like it, yes.

Mr. Wilson: All right. I offer General Counsel's Exhibit 5 for identification into evidence.

The Witness: Unless you compare it directly, but it does appear to be.

(Testimony of Lon Chaney.)

Trial Examiner: Any objections, subject to checking it?

Mr. Irwin: No. I have no objection.

Mr. Smith: No objection.

Trial Examiner: There being no objection, the paper is received into evidence, and I will ask the reporter to kindly mark it as General Counsel's Exhibit No. 5.

(The document heretofore marked General Counsel's Exhibit No. 5 for identification was received into evidence.)

Q. (By Mr. Wilson): Now, I have no intention nor desire of reviewing your testimony in detail given on direct, but I think perhaps you will agree with this summary with respect to the way things stood on January 6, at the January 6 meeting.

The parties were in agreement with respect to the contents of General Counsel's Exhibit 5, is that right, sir? [67]

* * * * *

The Witness: To answer your question, then there was nothing that we were in disagreement on, that is currently in this tentative agreement here.

Q. (By Mr. Wilson): Of General Counsel's Exhibit 5?

A. Right.

Q. That is in General Counsel's Exhibit 5.

Now, I believe you testified that there were five [69] subjects of discussion apart from General Counsel's Exhibit 5 at the January 6 meeting. One was union security. Two was check-off. Three was wages con-

(Testimony of Lon Chaney.)

cerning which I think you said there was a fairly heated discussion. Four, wage reopener. Five, duration of agreement. A. Correct.

Q. Have I correctly stated your testimony?

A. Yes.

Q. All right. The union on January 6 through its representatives proposed that the contract should contain the union security clause, is that correct?

A. Correct.

Q. The company opposed?

A. Correct.

Q. The union gave in and said, "Okay. No union security."

So you had an agreement that there would be no union security, am I right? A. Right.

Q. The union proposed that there be a check-off provision in the contract at the January 6 meeting?

A. Correct.

Q. The employer opposed it, correct?

A. Correct.

Q. The union conceded, so there was an agreement that there would be no check-off provision? [70]

A. Correct.

Q. The union made a wage proposal, something to do with the rate in pay. I am not concerned at the moment whether it be two cents or 45 cents or what the amount was, whether it was five percent or ten percent, but they proposed a raise, am I correct?

A. Correct.

Q. You or Mr. Irwin, the employer representatives stated that in view of the steel strike and in view of

(Testimony of Lon Chaney.)

some other conditions, it was not feasible for the employer to give a wage increase at that time?

A. Correct.

Q. Mr. Irwin or you or someone of the company representatives proposed that instead of a wage reopener as of January 6, that there be a wage reopener in a period of six months with a waiver of the no strike, no lock-out provision, am I correct?

A. I don't know that management was the one that necessarily proposed this.

Q. The union wanted the raise. You didn't want to give them a raise. Didn't you make a counter-proposal that, "We can't give it to you now, but six months from now we will sit down and discuss it again?"

A. Yes. We said we would sit down in six months.

Q. And discuss it again? [71]

A. Right.

Q. And the union said okay? A. Right.

Q. So you were in agreement on that?

A. No, because then is when Mr. Irwin brought up the points that have to be settled along with it.

Q. We will come to that in a moment. You were in agreement that there would be a wage reopener, and that after six months, after the contract was executed, you would sit down with a waiver of no strike no lock-out provisions and negotiate a wage raise, am I correct? A. Correct.

Q. All right. Management proposed, either you or Mr. Irwin, that any contract that was entered into at

(Testimony of Lon Chaney.)

this time would be for a duration of one year, am I correct? A. Correct.

Q. The union agreed to it, am I correct?

A. Yes.

Q. At the very close of the meeting, you or Mr. Irwin, management said, "Now, with respect to details in connection with any wage reopener that you say you are willing to, there may be some provisions about who notifies whom, when, about what, but those are things that can easily be worked out;" and to that Mr. West nodded his agreement, is that correct? [72]

A. These are things that would have to be worked out, yes.

Q. Those were things that would have to be worked out and that would be worked out, am I correct?

A. Correct.

Q. And the statement that was made by management were these things that can be worked out and Mr. West nodded his agreement, am I correct?

A. Yes. [73]

* * * * *

ERNEST WEST,

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Trial Examiner: Will you kindly state your name, sir?

The Witness: Ernest West.

Trial Examiner: Will you kindly spell your last name for the record.

The Witness: W-e-s-t.

(Testimony of Ernest West.)

Trial Examiner: Where do you live, sir?

The Witness: I live at 1937 Greer Street, Pomona.

Trial Examiner: You may be seated, please.

Mr. Irwin, you may proceed with the examination of Mr. West who has been duly sworn.

Mr. Irwin: Thank you, sir. [74]

Direct Examination

Q. (By Mr. Irwin): Mr. West, what is your business or occupation?

A. I am assistant director of the United Auto Workers, Region 6.

Q. Headquarters where, sir?

A. 8501 South San Pedro Street, Los Angeles.

Q. Mr. West, you have been in the hearing room since this morning, and you have heard the testimony of the parties, is that correct?

A. That is correct.

Q. You heard testimony with respect to a meeting held on January 6?

A. Yes, I have.

Q. Would you tell us whether or not there was any discussion of the details of a wage reopener at that meeting of January 6?

A. Your proposal was that there would be six months wage reopener with waiver of a no strike no lock-out clause. [75]

* * * * *

Q. (By Mr. Irwin): Did you in fact present this to the membership?

A. Certainly did, yes, sir.

(Testimony of Ernest West.)

Q. Do you recall when that was?

A. I believe it was on February 6.

Trial Examiner: Do you believe or is that your best [77] recollection?

The Witness: Yes, February 6.

Q. (By Mr. Irwin): Mr. West, wasn't it presented to the membership on January 21?

Mr. Wilson: I object to leading the witness.

Trial Examiner: Overruled.

The Witness: It was not presented to the membership. It was presented to the employees of the company. We got an immediate protest. [78]

* * * * *

Q. (By Mr. Irwin): You did have a meeting on January 21, is that correct?

A. Thereabouts, yes.

Q. On or about January 21st, and certain people were present that were employees of the respondent, is that correct?

A. I assume they were employees of the respondent.

Mr. Irwin: I will ask the reporter to mark this as Respondent's Exhibit Number 2.

(Thereupon the document above referred to was marked Respondent's No. 2 for identification.)

Q. (By Mr. Irwin): I will show you this, Mr. West, and ask you have ever seen this before?

A. Did not see this one.

Q. You have never seen this before?

A. No, sir. [79]

Q. Does this refresh your recollection at all with respect to whether—

(Testimony of Ernest West.)

A. I know there was a meeting called, but it doesn't come within my scope of calling the meetings. I did not write that nor did I see that before.

Q. Were you present at that meeting?

A. Yes, I was.

Mr. Irwin: I will ask the reporter to mark this as Respondent's Exhibit 3 for identification.

(Thereupon the document above referred to was marked Respondent's Exhibit No. 3 for identification.)

Q. (By Mr. Irwin): Mr. West, I will show you this. Have you ever seen that notice before, Mr. West?

A. No. I did not see this one before either.

Q. Now, getting to this meeting on about January 21, was a total proposed contract submitted to the people there for acceptance or rejection? A. Yes.

Q. Do you know of your own knowledge whether it was accepted or rejected?

A. It was accepted.

Q. It was. I beg your pardon.

A. It was accepted. You are speaking of the January 21st meeting?

Q. Right.

A. Or thereabouts? [80]

Q. Right.

A. Let us see. Well, I'm not clear on the date. I—

Q. Well, approximately January 21st.

A. Yes. It was, it was finally accepted.

Q. I'm talking about at that meeting.

A. No. I don't think it was accepted at that meeting.

(Testimony of Ernest West.)

Q. Did you have a vote?

A. We had a vote. We also had a protest.

Q. Now, you had another meeting, did you not?

A. We did.

Q. On February 6th?

A. Correct.

Q. Let me ask you, do you know approximately how many people participated in the vote on January 21st?

A. I don't recall.

Q. Well, to the best of your recollection.

A. Oh, 35, I imagine.

Trial Examiner: 35?

The Witness: 35 or 40. I don't recall, exactly.

Mr. Irwin: I will ask the reporter to mark this as Respondent's Exhibit 4 for identification.

(Thereupon the document above referred to was marked Respondent's Exhibit No. 4 for identification.)

Q. (By Mr. Irwin): Mr. West, I will ask you if you have ever seen Respondent's 4 for identification?

[81] A. No. I did not see this one either.

Q. Let me ask you, Mr. West, if you know, who prepares notices of meetings; who in your organization, if anybody, is responsible for preparing notices?

Mr. Wilson: I object on the ground that it is without any need, without any purpose, and it is irrelevant and immaterial to this proceeding. This is simply an effort to go into the internal affairs of a labor organization.

Trial Examiner: Overruled.

(Testimony of Ernest West.)

Q. (By Mr. Irwin): Do you know who is in charge of preparing these?

A. I assume one of the girls in the office, the mimeograph operator or somebody.

Q. Well—

Mr. Smith: May I interrupt and say that we will offer no objection to foundation on these three documents.

Mr. Irwin: Fine.

Mr. Smith: If that is the problem here. We think they are immaterial, and will object, but for foundation, we will stipulate that they were in fact distributed on or about the date that appears in the lower left hand corner of each.

Mr. Irwin: Fine.

Mr. Smith: Or what appears to be on the face.

Trial Examiner: Do you accept that statement?

Mr. Irwin: Yes, thank you, Mr. Smith. That is all. [82]

Trial Examiner: Do you have any objection to that stipulation, Mr. Wilson?

Mr. Wilson: Well, I will take it as a statement of facts from the charging party, and I will accept it as such; but I will not—

Trial Examiner: No. He doesn't offer that yet.

Mr. Wilson: Aside from that, I don't know it is a fact, but on Mr. Smith's word that it is, I will accept his word.

Trial Examiner: You may proceed, Mr. Irwin.

Mr. Irwin: Thank you.

(Testimony of Ernest West.)

I will move that Respondent's Exhibits 2, 3 and 4 be received into evidence at this time.

Mr. Smith: We will object on grounds of materiality.

Trial Examiner: What is the purpose of these?

Mr. Irwin: Well, I think that—well, I will withdraw the offer at this time. I will renew it at a later time.

Trial Examiner: Very well.

Q. (By Mr. Irwin): Now, I believe you testified that there was a meeting on February 6, is that correct?

A. Correct.

Q. Now, between January 6 and February 6, Mr. West, did you have any meetings with company representatives? A. No, I did not.

Q. Did you notify the company representatives of the results of the January 21st meeting? [83]

A. I did not, nor any other meeting. I notified them.

Q. Did you instruct anyone to notify the company as of the results of those meetings?

A. I did not. I didn't think it was any of the company's business.

Q. Now, let us move to the meeting of February 6th, Mr. West.

Was the contract presented to those present at that meeting?

A. Yes, it was.

Q. Was a vote with respect to acceptance or rejection held at that meeting? A. Yes, it was.

(Testimony of Ernest West.)

Q. Was the vote for acceptance or against acceptance of the agreement?

A. It was for acceptance.

Q. Approximately how many people were present at that meeting?

Mr. Wilson: I will object, your Honor, it is irrelevant and immaterial and an internal affair of a labor organization. Aside from that, whether they accepted it or rejected it, the labor organization is the bargaining representative certified by the Board, and it is up to the bargaining representative to bargain without respect to a vote of the membership or anyone else; and this labor organization accepted a contract from this employer, and this employer [84] refused to execute the final agreement which had been accepted by the labor organization.

Trial Examine: But that doesn't say that this question cannot be answered.

Mr. Wilson: I am sure it can be if you overrule my objection, Mr. Trial Examiner.

Trial Examiner: I will overrule your objection.

Will the reporter please read the question to the witness?

(Record read.)

The Witness: 35 or 40. About the same number.

Q. (By Mr. Irwin): At the meeting of January 6th, Mr. West, did you tell the company that you accepted the proposed agreement?

A. I told the company that I would submit it to our membership and be in touch with them. It was your proposal, sir.

(Testimony of Ernest West.)

Q. That is what I said, the proposed agreement.

Didn't you say that it was up to the people to accept or reject?

A. No, I did not.

Q. It was up to the membership to accept or reject this, that you had to submit it to them?

A. No. I did not. I told you that I would take it to the membership.

Q. Now, is it your testimony that you did not say that the [85] membership would have to vote on this?

A. We allow our membership to vote. I did not say that.

Q. At that meeting?

A. I told you that I would take it to our membership.

Q. And that you would be in touch with the company? A. Correct.

Q. Now, after the meeting of January 21st, I believe you testified you did not contact the company?

A. I did not.

Q. Did you contact the company after the February 6th meeting?

A. I did not. I contacted Fred Fergurson of the conciliation service.

Q. Did you in making a presentation to the membership, did you have anything written down with respect to any notes or anything with respect to this wage re-opener clause?

A. No, sir. I only, my only notation on those was there would be a wage re-opener clause with waiver of the no strike no lockout clause. [86]

* * * * *

(Testimony of Ernest West.)

Mr. Wilson: I offer into evidence Respondent's Exhibits 2, 3 and 4 for identification.

Trial Examiner: As?

Mr. Wilson: You can change the numbers if you wish to General Counsel's Exhibits next in order.

Trial Examiner: Are there any objections?

Mr. Irwin: Well, I think they should properly go into evidence as Respondent's Exhibits. They were in connection with examination by Respondent. [87]

Trial Examiner: Do you want them as your exhibits?

Mr. Irwin: I prefer.

Trial Examiner: Any objection to the Respondent offering these?

Mr. Smith: I have no objection.

Mr. Wilson: No objection.

Trial Examiner: There being no objections, the papers are received into evidence, and I will ask the reporter to kindly mark them as Respondent's Exhibits Numbers 2, 3 and 4 respectively, and these are the same papers which Mr. Wilson had proffered and which he has agreed to allow the Respondent to offer.

(The documents heretofore marked Respondent's Exhibits Numbers 2, 3 and 4 for identification were received in evidence.) [88]

* * * * *

VINCE SCHARFENBERG,

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Trial Examiner: Will you kindly give your name.

(Testimony of Vince Scharfenberg.)

The Witness: Vincent Scharfenberg.

Trial Examiner: Will you kindly spell your name.

The Witness: S-c-h-a-r-f-e-n-b-e-r-g.

Trial Examiner: Where do you live, sir?

The Witness: 5849 Buena Vista Terrace, Los Angeles.

Trial Examiner: You may be seated, sir.

Mr. Irwin, you may proceed with the examination of Mr. Scharfenberg who has been duly sworn.

Mr. Irwin: Thank you.

Direct Examination

Q. (By Mr. Irwin): Mr. Scharfenberg, you are employed by Holly-General Company, is that correct?

A. Yes, sir.

Q. In what capacity?

A. I am a special assembler.

Mr. Wilson: What kind of a special assembler?

The Witness: Special assembler.

Q. (By Mr. Irwin): Are you hourly paid?

A. Yes, sir.

Q. Are you a supervisor; are you a foreman, Mr. Scharfenberg? A. No. [89]

Q. Mr. Scharfenberg, I am going to show you Respondent's Exhibit 1 and ask you to examine it and ask you if you have ever seen that before?

A. Yes, I have.

Q. Did you ever present this to the National Labor Relations Board in Los Angeles, California?

Mr. Wilson: I object to the leading of the witness.

Trial Examiner: Overruled.

The Witness: Yes, I have.

(Testimony of Vince Scharfenberg.)

Q. (By Mr. Irwin): Do you recall on what date that was?

A. Approximately February 16th or 17th. I don't know exactly, though. [90]

* * * * *

Q. Did you ask permission to leave the plant?

A. I did.

Q. Of whom did you ask permission?

A. My supervisor.

Q. What is his name? A. Charles Burton.

Trial Examiner: (Spelling) B-u-r-t-o-n?

The Witness: B-u-r-t-o-n, yes, sir.

Trial Examiner: Thank you.

Q. (By Mr. Irwin): What if anything did you say to Mr. Burton about leaving the plant?

A. Well, I asked him if I could go uptown and take care of some business, and he said, I told him the nature of the business, by the way—and he said if I stamped out, clocked out, that is, he could not—in other words, they couldn't pay me for it.

So I clocked in and clocked out and it was on my own time, what I'm trying to say.

Q. (By Mr. Irwin): Where did you go?

A. Well, I got the wrong address.

Trial Examiner: You eventually came to this building? [91]

The Witness: Yes, sir, the 6th floor.

Trial Examiner: In this building?

The Witness: Yes, sir.

Q. (By Mr. Irwin): Now, did you talk to anybody up there?

(Testimony of Vince Scharfenberg.)

A. Yes, sir. I talked to the NLRB lawyer, and we filled out—do you want me to go on and say what happened?

Q. Yes. What happened while you were there?

Trial Examiner: Do you remember his name?

The Witness: No, I don't. I can tell you which room it was, if that will help.

Trial Examiner: I don't want you to.

The Witness: Anyway, I presented this here petition to him.

Q. (By Mr. Irwin): That is Respondent's 1?

A. Yes, and he made me sign out forms and so forth and so on, and then after it was all done, about 45 minutes I guess it took, he showed it to another lawyer, he said. In the place they have about three of them up there.

Trial Examiner: Well, I think they got about 30 of them.

The Witness: Anyway, the lawyer he showed it to, after I got it filled out, all these forms and answering all these questions, because he said it wasn't made out right. It wasn't dated. It was too soon. It had been after the 27th, I think he told me, of February, that is, so it wasn't any [92] good. So—

Trial Examiner: You don't know the second lawyer's name?

The Witness: No.

Q. (By Mr. Irwin): All right. What did you do then?

A. Well, then I came back to work and clocked in, and I took this here and gave it to the Personnel De-

(Testimony of Vince Scharfenberg.)

partment and talked to Mr. Chaney and Jean Amman, and told them what happened.

Mr. Irwin: I have no further questions.

Trial Examiner: Mr. Wilson, do you have any questions?

Mr. Wilson: Yes, sir. [93]

* * * * *

Q. (By Mr. Wilson): He has sort of reddish hair?

A. No. This I am pretty sure. It was black hair.

Q. This petition that you got, this Respondent's 1, where did you get it? [94]

A. This petition here?

Q. Yes.

A. From the Personnel Department.

Q. Do you mean the Personnel Department of Holly-General?

A. That's right. This petition here?

Q. Yes. A. Yes.

Q. Was that before you spoke to your foreman or after you spoke to your foreman?

A. I think it was after I got the petition from the Personnel Department, I spoke to the foreman.

Q. How long had you had that petition, that Repartment. Then you went to and spoke to your foreman, is that correct?

A. Supervisor, yes, sir.

Q. Or your supervisor, and that is Mr. Burton?

A. Mr. Burton, that is right.

Q. How long had you had that petition, that Re-

(Testimony of Vince Scharfenberg.)

spondent's 1 before you spoke to your supervisor Burton?

A. Oh, within an hour, I would say. An hour, an hour and a half. I don't remember exactly. [95]

* * * * *

Q. Well, when you went to the Personnel Department, to whom did you speak?

A. Jean Amman.

Q. That is that young lady that just left the room?

A. That's correct.

Q. Will you tell us the conversation you had with her?

A. Well, I told her I wanted the petition to take down.

Q. To take down where?

A. To the Labor Board. [101]

Q. What did she say?

A. She didn't say nothing. She just got the petition for me. [102]

* * * * *

Mr. Irwin: Excuse me. I have just handed to General Counsel the results of the search of the time cards which reveal this information. Now, this has been a cursory search.

Mr. Wilson: Subject to correction, and by the way, it jibes with what I guessed.

I proposed a stipulation that it was on February the 8th.

Trial Examiner: I beg your pardon?

Mr. Wilson: That it was on February 8th, 1960, that this witness clocked out of Holly-General at 12:01

(Testimony of Vince Scharfenberg.)

for the purpose of coming to the Board and clocked back in at 2:03.

The Witness: Could I have been that far off?

Mr. Wilson: You so stipulate?

Mr. Irwin: Yes, subject to further verification. I will say that that was handled over the telephone, and in a [111] quick cursory search of the time cards. This was the information that was given.

Trial Examiner: Do you accept that stipulation, Mr. Smith?

Mr. Smith: Yes. That is acceptable.

Mr. Wilson: And I accept it. I don't know whether the trial examiner was finished inquiring. [112]

[Endorsed]: Filed May 9, 1960.

GENERAL COUNSEL'S EXHIBIT 2

[Letterhead]

February 12, 1960

Mr. E. West
Western Region No. 6
U.A.W.
8501 South San Pedro Street
Los Angeles 3, California

Dear Mr. West:

Confirming our representative's statements during the meeting of February 12, 1960, at which meeting we were requested to reduce the contract to its final form and execute it, and so that there will be no misunderstanding, we wish to re-state the Company's position. As we told you, within the last several days, we have received a petition signed by more than sixty percent of our employees in the bargaining unit requesting that an election be held to determine the question of employee representation. We are further informed that one or more employees went to the Board to initiate such an election, and that they were told that they were premature.

In view of the fact that the certification year expires in less than two weeks, and in view of the expressed desires of our employees against your continued representation, which expression was contained in the petition above referred to and the signatures on which we have verified, it appears to us that to reduce our agreement

to final form and execute it would operate to deprive our employees of their rights to an election to determine the question of continued representation.

We therefore have offered and renew our offer, to execute the final agreement, such agreement to take effect upon the happening of any of the following events:

1. A reasonable time has elapsed from the earliest date at which a petition for election could be filed and no such petition is filed, or

2. A petition for election is filed within such time and the petition is dismissed by the Board, or

3. A petition is filed and an election held with results favorable to your organization.

This proposal was made and is renewed in the sincere belief that in view of all of the circumstances that it affords the greatest protection to yourselves, to our employees, and to the Company.

Very truly yours,

/s/ L. R. CHANEY,
Vice President-Manufacturing.
LRC:vg

Admitted in Evidence May 2, 1960.

GENERAL COUNSEL'S EXHIBIT 4

United States of America
National Labor Relations Board
Case Nos. 21-RC-5383, 21-RC-5387
"NON D"
Type of Election
Consent Agreement
Stipulation
Board Direction

HOLLY-GENERAL COMPANY, A DIVISION OF THE SIEGLER CORPORATION,

(Employer),

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AFL-CIO,

(Petitioner).

CERTIFICATION OF REPRESENTATIVE

An election having been conducted in the above matter by the undersigned Regional Director of the National Labor Relations Board in accordance with the Rules and Regulations of the Board; and it appearing from the Tally of Ballots that a collective bargaining representative has been selected; and no objections having been filed to the Tally of Ballots furnished to the parties, or to the conduct of the election, within the time provided therefor;

Pursuant to authority vested in the undersigned by the National Labor Relations Board,

It Is Hereby Certified that International Union, United Automobile, Aircraft & Agricultural Implement Workers of America (UAW), AFL-CIO has been designated and selected by a majority of the employees of the above-named Employer, in the unit herein involved, as their representative for the purposes of collective bargaining, and that, pursuant to Section 9(a) of the Act as amended, the said organization is the exclusive representative of all the employees in such unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

Signed at Los Angeles, California, on the 26th day of February, 1959,

[Seal]

On behalf of
National Labor Relations Board,
/s/ RALPH E. KENNEDY,
Regional Director for,
Twenty-First Region,
National Labor Relations Board.

Admitted in Evidence May 2, 1960.

GENERAL COUNSEL'S EXHIBIT 5
AGREEMENT

This Agreement made and entered into as of the ..... day of ....., 19...., by and between Holly-General Company, 875 So. Arroyo Parkway, Pasadena, hereinafter called the "Company," and the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, UAW-AFL-CIO and Amalgamated Local Union No. 509, hereinafter called the "Union."

Article I—Recognition

The Company recognizes the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, UAW-AFL-CIO, and its Local 509, as the sole representative for the purpose of collective bargaining for all factory employees, and shall negotiate with the accredited representatives thereof on any dispute which may arise concerning wages, hours and working conditions.

The purpose and intent of the Employer and the Union in entering into this collective bargaining agreement is to set forth their agreement on rates of pay, hours of work and other conditions of employment, in order to promote harmonious and orderly relations between the employer and the employees, and to provide procedure for prompt, equitable adjustment of grievances to the end that there shall be no interruption or impeding of work, work stoppages or strikes or other interferences with efficient production by either party during the life of this agreement.

Article II—Representation

Section 1. The employees shall be represented by a Bargaining Committee of three (3) members selected from such employees for the purpose of settling grievances and conducting negotiations with the Company.

Section 2. The Bargaining Committee reserves the right at any and all times to call in a representative of the International Union and/or the Local Union Business Representative.

Section 3. International Representatives and/or the Local Union Business Representative shall have access to the Plant, for the purpose of investigating alleged violations of this Agreement, which cannot be settled between the Bargaining Committee and the Management, upon making formal request and stating their reason to the Director of Industrial Relations, or his designated representative.

Section 4. Department Stewards shall be selected by the Union from the employees in the department he represents. There shall be not more than one (1) Steward for each department on each shift.

Section 5. It is understood and agreed that all employees who have been designated as the Bargaining Committee or as stewards, also have full time work to perform for the Company. Before any Union representative leaves his work station to attend a grievance meeting or a grievance investigation, he must inform his foreman of the reason for leaving and the location. Prior to entering another department, he will inform the department foreman of his presence and reason for being there and upon completing such business, he will inform his foreman he has returned to his job.

Section 6. A total of ten (10) hours per month will be allocated for the investigation of grievances for all stewards. These hours will be accumulative for the stewards only. A total of 17½ hours per month will be allocated for grievance meetings or grievance investigation for the bargaining committee, these hours will be accumulative for the bargaining commiteee only.

Management's Rights

Any of the rights, powers, or authority that the Company had prior to the signing of this agreement are retained by the Company except those specifically abridged, delegated, granted or modified by this agreement or any supplimentary Agreement that may hereinafter be made.

These rights include the authority to hire, direct, increase the working force, determine the products to be manufactured, establish schedules of production, determine the methods, processes, means and places of manufacture, including the right to subcontract work.

The authority to adjust, transfer and decrease the working force, to remove employees, and maintain discipline shall be vested in the management except as hereinafter limited by the provisions of this agreement.

Article III—Grievance Procedure

A grievance is defined as a dispute over wages, hours conditions of work, or interpretation of this contract, wherein it is alleged that the Company has violated this Agreement.

Step 1. Any employee having a grievance shall discuss same with his supervisor within two working days

of its occurrence or within two days when he should reasonably have known of same. Such employee may, have his steward present at such discussion. If no satisfactory settlement is reached at such discussion, then

Step 2. A written grievance, signed by the employee or employees involved and his steward, and stating the facts upon which it is based; the remedy or correction desired the Company to make, the section or sections of this Agreement, if any, relied upon or claimed to have been violated, shall be presented to the supervisor within two working days of the discussion held under Step 1. The supervisor shall give a written answer to such grievance within seventy-two hours of its written presentation to him.

Step 3. If the Union is not satisfied with the written answer, the grievance shall be transmitted to the Personnel Manager within two working days from the date of the supervisor's written answer. The Personnel Manager shall contact the chairman of the committee and arrange a conference; such conference shall be held within seven working days of the transmittal of the written grievance to the Personnel Manager. The Personnel Manager shall give his decision or answer within seven working days of the conference.

Step 4. If the Union is not satisfied with the answer, the Union may submit the grievance to arbitration within fifteen working days. The Company and the Union shall first attempt to agree on the selection of an impartial arbitrator. If no such agreement is reached, then the party requesting arbitration shall re-

quest the Federal Mediation and Conciliation Service to submit a panel of seven arbitrators. If no mutually acceptable arbitrator can be agreed upon from the list, such selection shall be made by the process of elimination and the party requesting arbitration shall eliminate the first name. If the entire panel is mutually unacceptable, a new panel of seven names will be requested.

A. Only those grievances consisting of disputes arising from a change or violation of this Agreement shall be submitted to arbitration. The arbitrator shall not have the right to add to, or subtract from, or modify any of the terms of this Agreement; or to establish standards of production or wage rates and shall have the authority to render decisions only within the scope and terms of this Agreement.

B. If time limitations imposed in this Article are not complied with by the employee or the Union, satisfactory settlement of the grievance will be conclusively presumed. If the Company does not comply, the grievance is deemed granted.

Article IV—Wages and Hours

Section 1. The normal work week shall consist of five (5) consecutive eight (8) hour work days starting on Monday.

Section 2. The Company shall establish and maintain regular shifts with regular starting and quitting times. The exception to this shall be that when production or shipping schedules, or work load or flow requires, the Company reserves the right to assign a

regular shift or shifts of a different time to different departments, or to individuals within a department.

Section 3. Two ten minute rest periods will be allowed, one during each half of each shift at times established by the Company.

Section 4. A five minute area and/or machine clean-up period will be allowed at the end of each shift, and after the individual work area is clean; the remaining time may be used as personal wash up time.

Section 5. Time and one-half will be paid for all authorized hours if worked in excess of eight (8) hours in any one day.

Section 6. Employees will suffer no loss of overtime pay because of any changes in work schedule.

Section 7. Saturday work shall be paid for at time and one-half.

Section 8. Sunday work shall be paid for at double time.

Section 9. All hours worked in excess of twelve (12) hours in any one day shall be paid for at double time.

Section 10. Where work is performed on a regular paid holiday, pay for such work shall be paid for at one and one-half times the regular hourly rate. In addition, such employees, if otherwise qualified, shall receive his holiday pay.

Section 11. Premium payments shall not be duplicated for the same hours worked under any of the terms of this Agreement.

Section 12. All employees working on the second shift (Swing) shall be paid .08 cents per hour as a premium for working that shift. All employees working on the third shift (Graveyard) will be paid .12 cents per hour as a premium for working that shift, plus eight hours pay for 6½ hours work.

Section 13. Eight hours straight time shall be paid at the employees' regular guaranteed straight time hourly base rate exclusive of night shift and overtime premium if they do not work on the following holidays: New Year's Day, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day and Christmas Day. (If a holiday falls on Saturday, it will be observed on the preceeding Friday. If a holiday falls on Sunday, it will be observed on the following Monday. An employee must work the first regular day before and after the holiday to qualify for holiday pay.

Section 14. When one of the above holidays falls within an employee's approved vacation period and he is absent from work during his regular scheduled work week because of such vacation, he shall be paid for such holiday, or receive an extra day's vacation with pay at the discretion of the company.

Section 15. With the following exception, all employees on the active payroll will receive holiday pay for holidays not worked.

Exception: Employees on layoff, leave of absence, or sick leave will receive holiday pay for holidays not worked only if the holiday falls or is observed within one calendar week of the last day they actually worked.

Section 17. Employees coming to work at the regular starting time of their shift, and not having been previously notified not to report shall be given four hours work at their regular rate of pay, or shall be paid four hours wages at their regular guaranteed hourly base rate, unless such employee cannot work for reasons beyond the control of the company.

Article V—Vacations

1 year—1 week
2 years—2 weeks
10 years—3 weeks

Employees who have not completed one year of service are not entitled to paid vacation.

Article VI—Seniority

Section 1. Employees shall be considered probationary employees until they have continued in the employ of the Company for sixty days.

Section 2. There shall be no seniority among probationary employees. After the probationary period, their seniority shall start from last hiring-in date. Probationary employees shall not have access to the Grievance Procedure.

Section 3. There shall be no responsibility for the re-employment of probationary employees if they are laid off, terminated, or discharged, during the probationary period.

Section 4. In the event any employees have the same hire-in date, then their seniority shall be determined alphabetically according to the employee's surname.

Section 5. Seniority shall be plant-wide. For the purpose of above seniority, seniority lists shall be established, and in the event of any change, such changes shall first be agreed upon between the Company and the Union. In the event a new product is introduced which necessitates the establishing of a new department, the Company shall notify the Union. Such jobs shall then be established in conformance with other provisions of this Agreement.

Section 6. The Bargaining Committee shall head the seniority list.

Section 7. The Bargaining Committee shall be retained at work when any department is operating, provided there is work which they are qualified and capable of doing. Such Committeeman shall receive the same rate of pay as the man he displaces, but in no case shall the committeeman receive more than his regular garanteed base rate plus shift premium if applicable.

Section 8. At the end of their term of office, the Bargaining Committee shall revert to their original seniority.

Section 9. A complete seniority list of each department shall be made and posted in each department, which will be corrected once each month.

Section 10. A master and departmental seniority list shall also be provided to the Bargaining Committee, and a copy furnished to the Local Union office. A corrected copy will be furnished once each month.

Section 11. Employees transferred to another department shall not lose their plant-wide seniority.

Section 12. If any employee is temporarily transferred to a lower paid classification, his guaranteed hourly base rate will not be affected.

Section 13. If a seniority employee is temporarily transferred to a higher paid classification, the employee shall receive the higher guaranteed hourly base rate.

Section 14. When it becomes necessary to transfer employees temporarily from one department to another in order to meet an emergency, or to fill a position left open by the absence of another employee, or to take care of critical additional production requirements, then the selection shall be made as determined by the Management, provided junior employees are used where possible.

Section 15. Temporary transfers shall not exceed five days unless mutually agreed to between Company and Union, with the exception of vacation replacements.

Section 16. Employees while temporarily transferred shall hold seniority in the department from which they were transferred.

Section 17. Lay-off and Recall Procedure

Lay-off:

1. For the purposes of a reduction in the working force, seniority shall be applied on a job classification basis. The employee having the least seniority in that classification being reduced shall be the first laid off, regardless of his plant-wide seniority.

2. Any employee laid off under Section 1 shall have the right to displace any other employee with less plant-wide seniority, except that such employee may only bump into a job within the same or lower labor grade.

3. Any employee who elects to bump in accordance with this section must be capable of performing the job into which he bumps with a reasonable period of instruction. Reasonable period of instruction shall be determined by the Company, but in no case shall it exceed five days. "Instruction" as used in this section shall mean instruction as to what the job functions are, and not how to perform them.

4. Any employee who elects to bump in accordance with this section shall take the rate of the person he displaces.

5. In the event the employee fails to qualify on the job onto which he has elected to bump, as provided in Section 3 above, he shall be entitled to displace the least senior employee in the plant only. In the event such employee does not elect to displace said least senior employee he shall take the lay-off.

6. When possible, the Company shall give one week or 40 hours notice of any lay-off.

Recall from Lay-off:

1. Employees who have exercised their bumping rights due to a reduction in force must first be returned to their regular job held prior to the lay-off.

2. The most senior man on lay-off will then be recalled for work.

3. If a man is recalled to a job other than that from which he was laid off, he will have thirty days to qualify for that job.

4. If an employee refuses, or declines to take work available, for physical reasons, in a classification other

than that in which he last worked, he shall have the privilege of accepting the next open job should he choose.

5. Employees shall have recall rights for one year from date of lay-off, provided they notify the Company every thirty days, in writing, of his desire to return to work.

Section 18. Any employee who is incapacitated at his regular work by proven injury and/or compensable disease, or who is incapacitated from other proven injury and/or sickness, or disease, while employed by the Company, shall be transferred when possible to other work in the plant which he can properly perform, with due consideration of his seniority.

Section 19. There may be times when it become necessary for efficient production to place senior employees with special skill and experience on other than their regular shift. Such transfers shall be only until the work in the department is properly organized and other employees are experienced enough to efficiently carry on the work. The Company will notify the Bargaining Committee when such transfers are made.

Section 20. When a new job, or vacancy, occurs in any department it shall be posted in that department's designated space on the plant bulletin board for twenty-four hours and any seniority employee of that department desiring the job shall sign the posting. The seniority employee with the most departmental seniority who is physically and mentally capable, signing the posting, shall receive the job. Such seniority employee will be given sufficient trial to determine his ability to do the job which will not exceed 30 days.

Section 21. A justified discharge, or quit, shall result in loss of seniority and all employment rights.

Section 22. In the event it is necessary to recall an employee, notice shall be given to the eligible employee, in writing, at his last address shown in the Company records. Such employee must, within two days of receiving said notice, notify the Company of his intention to return to work, and must return to work not later than the fifth working day following receipt of notice. Any employee who fails to abide by these provisions may be subject to termination.

Section 23. Employees failing to report for work at the end of a leave of absence or vacation, or failing to notify the Company of their inability to report for work may be discharged.

Section 24. Employees must keep the Company and the Union informed at all times of their correct address. Failure to comply is reasonable cause for loss of seniority.

Section 25. Employees shall cooperate in furnishing the Company with their correct telephone number.

Section 26. No employee shall lose his seniority through sickness or accident, provided the employee notifies the company within three (3) working days.

Section 27. In case of accident or illness which prevents an employee from notifying the company, proper exception will be made after the employee furnishes proof he was unable to notify the company.

Section 28. Employees absent over three (3) consecutive working days for any cause except as listed

above, and who have failed to notify the company of absence during said three (3) working days, may be subject to termination.

Section 29. The Chairman of the Bargaining Committee and/or a Bargaining Committeeman shall be notified when an employee is disciplined by a layoff, discharge, or termination.

Article VII—Bulletin Boards

The company shall furnish two bulletin boards of a suitable size for the sole use of the Union, and the Union does hereby agree to post thereon only the following:

(a) Notices of Union recreational and social affairs;

(b) Notices of Union elections;

(c) Notices of Union appointments and results of Union elections;

(d) Notices of regular, or special Union meetings.

One bulletin board will be located by the time clock and the other will be located in the Canteen.

Article VIII—Leaves of Absence

Section 1. Employees shall be granted a reasonable leave of absence, not to exceed sixty (60) days, without loss of seniority for just cause, application to be made at least forty-eight (48) hours prior to the date leave is to be effective, except in case of emergency. The Union shall be furnished a notice of such leave.

Section 2. Seniority status to be maintained as of the original hiring-in date. Seniority shall be accumulative during such leave of absence.

Section 3. Leaves of absence may be extended for just causes at the employee's request, such extension to be mutually agreed upon by the Company and the Union. Employees accepting other employment while on leave may be discharged.

Section 4. Members of the Union elected to Local Union positions, or selected by the Union to do work which takes them from their employment with the Company, shall, upon written request from the Regional Director and/or the President of the Local Union, be given a leave of absence for a period not to exceed one year, which may be extended upon request, and with company approval. During such time, said employee's seniority shall continue to accumulate. At the end of such leave of absence, said employee shall be reinstated in his former classification at the rate prevailing for such classification, or one of comparable status if former job no longer exists, provided, however, that he is still physically and mentally fit and capable of performing said job. In the event he is not physically or mentally fit for such job, he shall be placed in a job in line with his seniority and capability.

Section 5. In the event that any employee of the company, who has seniority status, enters the military service of the United States, whether voluntarily or involuntarily, in conformity with the provisions of the Selective Service Act passed by Congress, such employee shall be deemed to be on leave of absence for the purpose of determining any rights of reinstatement to a like position in the service of the company. The company agrees to comply with all re-employment provisions of the Universal Military Training and Service

Act of 1951. It is agreed that this clause has to do with the requirements of that act, but has no application where the employee voluntarily enlists in regular service of the Armed Forces.

Article IX—Sick Leave

Sick leave will be earned at the rate of one day for each four month's service (3 days per year maximum) with the Company. Sick leave will be paid only for bonafide illness, proof to be furnished by the employee when requested, until such time as an employee has accumulated a total of six days, after which he may take cash for any additional earned sick leave in lieu of illness.

In the event of termination for any cause all earned sick leave will be paid.

Article X—Holidays

For the purposes of this Agreement, the following days shall be considered holidays:

New Year's Day
Memorial Day
Independence Day
Labor Day
Thanksgiving Day
Christmas Day

Eight hours (8) straight time shall be paid at the employee's regular straight time hourly base rate exclusive of night shift and overtime premium whenever an employee doesn't work on any of the above holidays providing he meets the eligibility requirements for holiday pay.

Eligibility for Holiday Pay

Anyone on the active payroll will be eligible for holiday pay providing the holiday falls within one calendar week of the last day they are actually at work. This will include anyone on lay-off, leave of absence or sick leave.

Article XI—Challenge of Time Standards

A. Any employee shall have the right to challenge a time standard within thirty days of establishment through his appropriate representative to the Company. Within twenty-four (24) hours thereafter, the employee and/or the appropriate union representative shall be given an opportunity to discuss the standard with a representative of the Industrial Engineering Department. When requested, a re-time study shall be made by the Company and witnessed by the appropriate Union representative.

B. Any disputed standard shall be subject to the grievance and arbitration procedures. In the event that such a dispute is submitted to arbitration, the question to be determined by the arbitrator shall be limited to whether the new or revised work standard established by the Company for the operation in question, was properly established under the Company's Industrial Engineering principles, techniques and procedures, or if not, in what respect errors were made thereunder in operation elements, basic timing or calculations. The arbi-

trator shall be concerned only with variations in excess of 5% of the standard time.

Article XII—Miscellaneous

Foremen and supervisors shall act in a supervisory capacity only, and they shall not perform any work or operation performed by regular workmen or operators at any time whatsoever, except on an experimental work, in cases of emergency, or for the purpose of instructing an employee or employees.

Article XIII—Wages

For the purpose of this Agreement, the following pay schedule (see appendix A) will be in effect.

Article XIV—Assignability

This Agreement shall be binding upon the successors and assigness of the parties hereto, and no provisions, terms or obligations herein contained shall be affected, modified, altered or changed in any respect by any change of any kind in the ownership or management of either party, either to or by the change herein specified above in the locations, place or operation or place of business of either party hereto.

Article XV—Strikes and Lockouts

Section 1: During the life of this agreement, no work stoppages, strikes or slow-downs shall be caused or sanctioned by the Union, and no lockouts shall be made by the company.

Section 2. Any employee, or employees, individually or collectively, who shall cause, or take part in, any strikes, work stoppages, interruptions, or any impeding of work, during the life of this agreement, may be disciplined or discharged by the company subject to the grievance procedure. Any such grievance shall be instituted in Step 3 of the Grievance Procedure.

Section 3: In the event that any employee or employees refuse to handle or perform any work, or handle materials or machinery or equipment because of sources of supply or the Union affiliation or non-affiliation of the labor engaged in such work, the Union agrees that they will, through their good offices, promptly notify such employee or employees that this is a violation of this agreement. Any employee or employees who engage in such action may be disciplined or discharged by the company. Such action by the company shall not be subject to the grievance procedure.

Article XVI—Duration

This Agreement shall become in full force and effect immediately upon signing by both parties, and shall remain in full force and effect until the ..... day of ....., 196.., and shall thereafter automatically renew itself in its entirety from year to year for a period of one year. On each renewal period, if either party should desire to terminate this Agreement or to add or to amend any terms thereof, at any ex-

piration date as provided above, it shall notify the other party in writing not less than sixty (60) days prior to such date, specifying the date for such termination, or the nature of the amendments sought.

Signed this .... day of ..... 19.....

Holly-General Company,
Division of Siegler Corporation,

By.....

International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, UAW-AFL-CIO and Amalgamated Local Union No. 509.

By.....

Admitted in Evidence May 2, 1960.

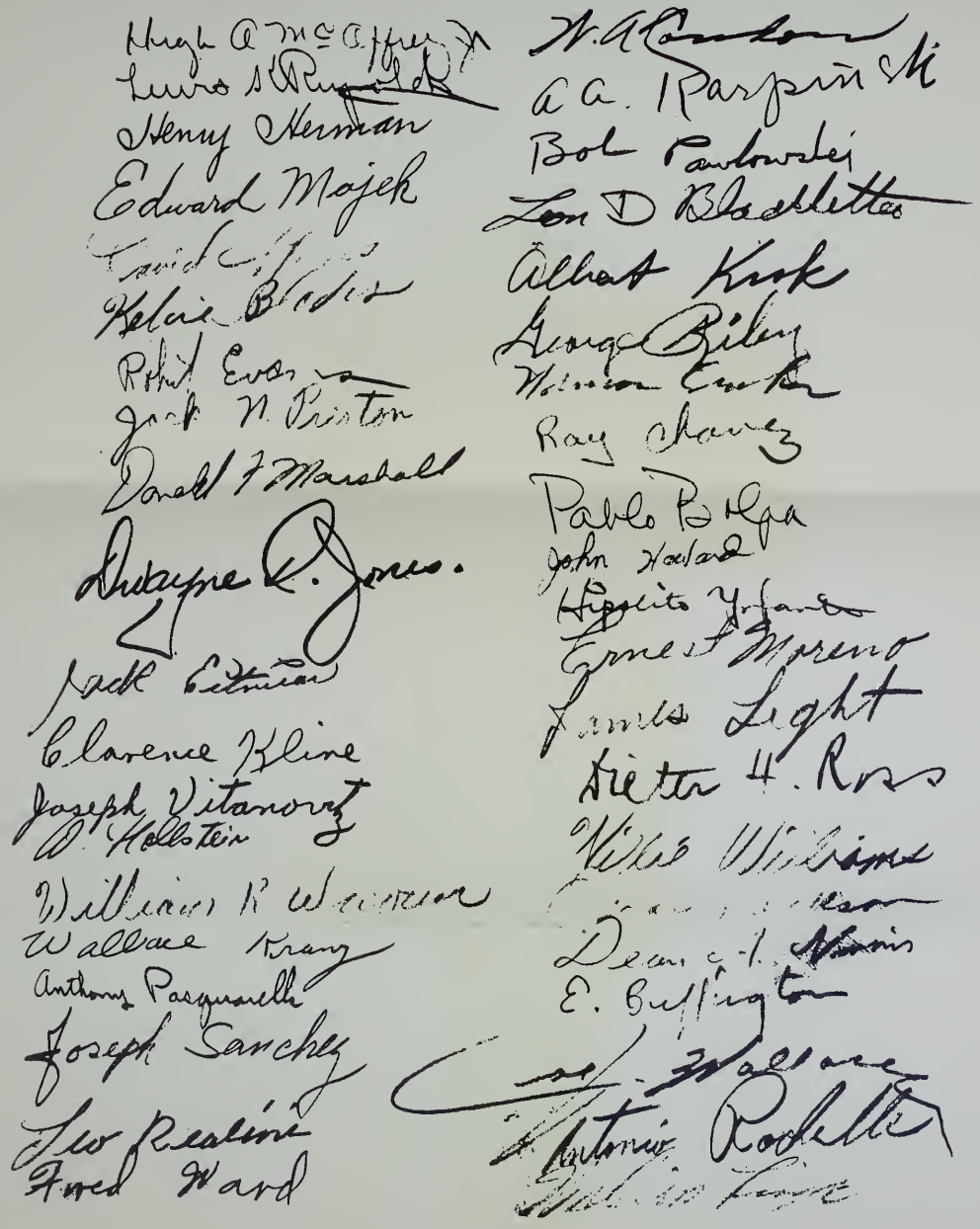
RESPONDENT'S EXHIBIT 1

(Pages 95 to 97)

Admitted in Evidence May 2, 1960.

TO WHOM IT MAY CONCERN

WE THE UNDERSIGNED REQUEST A VOTE AGAINST UNION REPRESENTATION IN THE SHOP OF HOLLY GENERAL PLANT 875 So. ARROYA PARKWAY, PASADENA, CALIFORNIA.

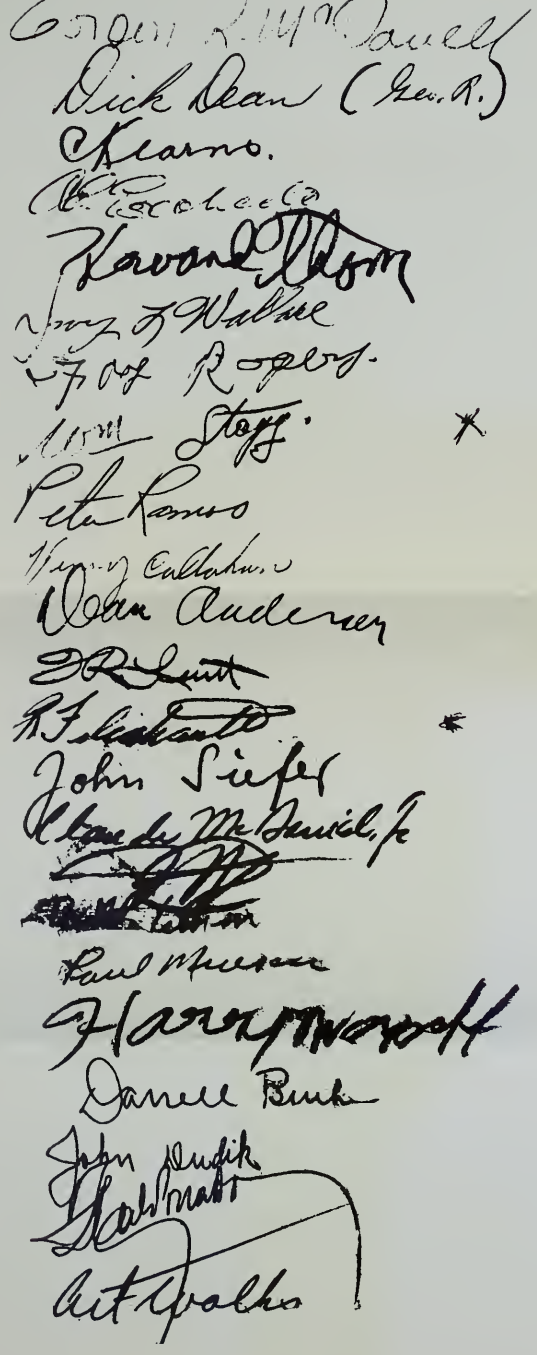


Ed Fitzsimmons Jr
William H. Gray
Tommy Parker
Ed Parker
Wilbur Ralph
R. S. Clock
Wilbur Henderson
Vincent Scharfenberg
George Johnson
R. Doug. Lawrence
Bill Guenthart
John Estrella
Jack Curran
Thomas Schmidt
Angel Echevarria
Gus Bands
Joe Pauro
John Jonesen
Payne A. Kelley
Wallace Daniels
Harry Geiser
Roger L. Bradley
Jerry F. Smith

(over)

Dwain F. Caskey
Age 6 1/2 yrs

Alfonso Marsh
Edward Nietzke
Chuck Chojnacki
Gene Thompson
Paul Flanagan
Willard Matthews
Ricky Hall
Hugh R. McKinnon
Antonio D. Cavalliere
Charles Cesar
Oliver Sims
Dale Steve
Bobby Hopkinson
Wayne Stone
Paul D. Bruce
[illegible]
Robert L. Pike
Clifford Madrid
William Kupferer
Janet Broderick
Charles Molter
George H. Jeffrey



RESPONDENT'S EXHIBIT 2

Meeting Reminder
Tonight—Right After Work (Both Shifts)
Veterans Hall (Post 1053)
810 E. Walnut, Pasadena

Holly Workers Hear the Reading of a Proposed Contract and Get All the Facts. You Be the Judge by Casting A Secret Ballot For or Against the Proposed U. A. W.—Holly Contract. Everyone Invited.

Refreshments—Coffee & Donuts Will Be Served.

U. A. W. Organizational Committee

oieu30afl-cio
1-21-60

Admitted in Evidence May 2, 1960.

RESPONDENT'S EXHIBIT 3

Special Meeting
Thursday, January 21st

For the last few weeks UAW Representatives along with your elected Committee have been meeting with Holly General Management in an effort to reach agreement on your contract. Holly Management made what it calls it's last offer regarding your contract and it is most important that you attend a special meeting to consider this offer.

The proposed contract will be presented to you for your approval or disapproval. Hear the final positions taken by your employer and the UAW Committee at the January 6 meeting.

Get all of the facts by being present and casting your secret ballot vote for or against the proposed contract. Ernest West, Region 6, UAW, Assistant Dir., who took part in final negotiations will be present to give his views concerning the proposed contract agreement.

A democratic Union must be guided by the desires of its membership. Do not disenfranchise yourself by being absent from this important meeting!

Special Holly Meeting
To Vote On A Contract

Date: Thursday, January 21

Time: (Day Shift) Right After Work
(Swing Shift) " " "

Place: Veterans Hall (Post 1053)
810 E. Walnut, Pasadena

oeiu30afl-cio

Admitted in Evidence May 2, 1960.

RESPONDENT'S EXHIBIT 4

Meeting Tomorrow

A Meeting Shall Be Held Tomorrow For the Purpose Of Voting to Accept Or Reject the Union Contract With the Holly General Company.

Those Eligible to Vote On the Proposed U.A.W. Contract Are Employees Who Signed Membership Cards. No Other Holly General Employees Than

Those Who Signed the U.A.W. Membership Card Will Be Eligible to Cast A Vote On the Accepting Or Rejecting of This Contract.

Date: — — — — — Saturday, Feb. 6, 1960

Time: — — — — 10:30 A.M.

Place: - - - - Veteran's Hall,
Post 1053
810 East Walnut
Pasadena, California

oeiu30aflcio
February 4, 1960

Admitted in Evidence May 2, 1960.

[Endorsed]: No. 17304. United States Court of Appeals for the Ninth Circuit. National Labor Relations Board, Petitioner, vs. Holly-General Company, Division of Siegler Corporation, Respondent. Transcript of Record. Petition to Enforce an Order of the National Labor Relations Board.

Filed: April 25, 1961.

/s/ FRANK H. SCHMID,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

HOLLY-GENERAL COMPANY, DIVISION OF SIEGLER CORPORATION,

Respondent.

PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151 et seq., as amended by 73 Stat. 519), hereinafter called the Act, respectfully petitions this Court for the enforcement of its Order against Respondent, Holly-General Company, Division of Siegler Corporation, its officers, agents, successors and assigns. The proceeding is known upon the records of the Board as Case No. 21-CA-3900.

In support of this petition the Board respectfully shows:

(1) Respondent is a Delaware corporation engaged in business in the State of California, within this judicial circuit where the unfair labor practices occurred.

This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act, as amended.

(2) Upon due proceedings had before the Board in said matter, the Board on January 3, 1961, duly stated its findings of fact and conclusions of law, and issued an Order directed to the Respondent, its officers, agents, successors and assigns. Thereafter, on February 16, 1961, the Board issued an Order Correcting Decision And Order. On January 3 and February 16, 1961, respectively, the Board's Decision And Order and Order Correcting Decision And Order were served upon Respondent by sending copies thereof postpaid. bearing Government frank, by registered mail, to counsel for Respondent.

(3) Pursuant to Section 10 (e) of the National Labor Relations Act, as amended, the Board is certifying and filing with this Court a transcript of the entire record of the proceeding before the Board upon which the said Orders were entered, which transcript includes the pleadings, testimony and evidence, findings of fact, conclusions of law, and the Orders of the Board sought to be enforced.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondent and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon

the pleadings, testimony and evidence, and the proceeding set forth in the transcript and upon the Order made thereupon a decree enforcing in whole said order of the Board, and requiring Respondent, its officers, agents, successors, and assigns, to comply therewith.

/s/ MARCEL MALLET-PREVOST,
Assistant General Counsel,
National Labor Relations Board.

Dated at Washington, D. C. this 15th day of March, 1961.

[Endorsed]: Filed March 16, 1961. Frank H. Schmid, Clerk.

[Title of Court of Appeals and Cause.]

ANSWER TO PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

Comes now Holly-General Company, Division of Siegler Corporation, Respondent herein, and Answers the Petition as follows:

1. Respondent admits the allegations contained in paragraphs (1), (2) and (3) of said Petition.

2. Respondent alleges that the Decisions and Orders of the National Labor Relations Board dated January

3, 1961, and February 16, 1961 contain findings of fact and conclusions of law which are not supported by the evidence.

3. That said Decisions and Orders of said Board, in addition to being unsupported by evidence and contrary to law, are not reasonably designed to effectuate the purposes of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151 et seq., as amended by 73 Stat. 519).

Wherefore, Respondent prays this Honorable Court that it cause notice of filing of this Answer to be served upon Petitioner, that it take jurisdiction of this cause, and after due hearing make and enter its Order and decree dismissing in its entirety said Petition, and set aside and annul said Orders of said Board.

/s/ PETER W. IRWIN
Sweeney, Irwin & Foye, Attorneys for Holly-General Company, Division of Siegler Corporation, Respondent.

Dated at Los Angeles, California, this 3rd day of April, 1961.

[Endorsed]: Filed April 5, 1961. Frank H. Schmid, Clerk.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS RELIED UPON BY THE BOARD AND DESIGNATION OF PARTS OF RECORD NECESSARY FOR A CONSIDERATION THEREOF

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

Comes now the National Labor Relations Board, petitioner herein, and pursuant to Rule 17 (6) of the Rules of this Court, files this Statement of the point upon which it intends to rely in the above-entitled proceeding, and this designation of the parts of the Record necessary for the consideration thereof:

I

Statement of Point

The Board properly determined that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to honor the Union's certification before it had been in effect for a year.

* * * * *

/s/ MARCEL MALLET-PREVOST
Assistant General Counsel
National Labor Relations Board

[Endorsed]: Filed April 25, 1961. Frank H. Schmid, Clerk.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS RELIED UPON BY RESPONDENT AND DESIGNATION OF PARTS OF THE RECORD NECESSARY FOR CONSIDERATION THEREOF

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

Comes now Holly-General Company, Division of Siegler Corporation, Respondent herein, pursuant to Rule 17 (6) of the Rules of this Court, and files its Statement of the point upon which it intends to rely in this cause, and designates the portions of the Record necessary for the consideration thereof:

I

Statement of Point

The determination of the Board that Respondent violated Sections 8(a)(5) and (1) of the Act by refusing to execute an agreement is contrary to law and not supported by the evidence.

* * * * *

Respectfully submitted,

Sweeney, Irwin & Foye
/s/ By PETER W. IRWIN
Attorneys for Respondent

Date: May 1, 1961.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed May 2, 1961. Frank H. Schmid, Clerk.

No. 17309

United States
Court of Appeals
for the Ninth Circuit

KAL W. LINES, Trustee in the Estate of ALBERT C. SCHOENING,

Appellant,

vs.

NORMA SCHOENING,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Northern District of California, Southern Division.

Phillips & Van Orden Co., 4th & Berry, S. F., Calif.—Rec. 5/23/61—Printed 6/6/61

No. 17309

United States
Court of Appeals
for the Ninth Circuit

KAL W. LINES, Trustee in the Estate of ALBERT C. SCHOENING,

Appellant,

vs.

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Appellee.

Transcript of Record

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

LOYD W. CARTER
1009 Mills Building,
220 Montgomery Street,
San Francisco 4, California,

Attorney for Appellant.

SHAPRO, ANIXTER & ARONSON,
P. O. Box 508,
Burlingame, California,

Attorneys for Appellee.

In the Southern Division of the United States District Court for the Northern District of California

No. 47987—In Bankruptcy

In the Matter of

ALBERT C. SCHOENING,

Bankrupt.

CERTIFICATE AND REPORT OF REFEREE RELATIVE TO PETITION FOR REVIEW OF ORDER DATED AUGUST 4, 1960

To Honorable Louis E. Goodman, United States District Judge for the Northern District of California:

I, Lynn J. Gillard, one of the referees in bankruptcy of the above-entitled court and the referee primarily in charge of the above-entitled bankruptcy proceeding, hereby respectfully certify and report:

This matter now is before the above-entitled United States District Court, acting in this specific proceeding in the above-entitled bankrutcy proceeding as an appellate court*, under the following set

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*"'In passing upon a petition for review of a referee's order, 'the proceeding is in substance an appeal from the court of bankruptcy * * * i.e., the referee * * * to the District Court.' In re Pearlman (C.C.A.) 16 F. (2d) 20, 21."

In re Big Blue Min. Co., (D.C., N.D., Calif.) 16 F. Supp. 50, 51 (Opinion by St. Sure, District Judge).

of circumstances leading up to the asking for a review of the complained-of order.

Papers Handed Up Herewith

Handed up herewith, as parts of this Certificate and Report, are the following purposes:

1. Petition for Turnover Order;

2. Order to Show Cause;

3. Answer of Norma Schoening to Petition for Turnover Order;

4. Trustee's Memorandum of Points and Authorities;

5. Respondent's Reply Memorandum;

6. Order (vacating submission for decision and resetting matter for hearing);

7. Reporter's Transcript (July 7, 1960), Book I and Book II;

8. Findings of Fact, Conclusions of Law and Order;

9. Petition for Review.

Dated: September 8, 1960.

Respectfully submitted,

/s/ LYNN J. GILLARD,
Referee in Bankruptcy.

[Title of District Court and Cause.]

PETITION FOR TURNOVER ORDER

To The Honorable Burton J. Wyman, Referee In Bankruptcy:

The petition of Kal W. Lines, Trustee of the estate of the above-named bankrupt respectfully represents:

That your petitioner is the duly appointed, qualified and acting Trustee of the estate of the above-named bankrupt who filed his petition in bankruptcy herein, and was thereafter duly adjudged a bankrupt;

That on the date of filing his petition in bankruptcy said bankrupt had in his possession one (1) 1952 Nash 4-door Statesman automobile; that pursuant to Section 690.24 of the Code of Civil Procedure of the State of California, said automobile was not exempt to said bankrupt; that on February 19, 1957, your petitioner filed his Trustee's Report of Exempt Property in which refused to exempt said automobile;

That on April 8, 1957, Trustee's Sale (Sealed Bids) of said 1952 Nash 4-door Statesman automobile was conducted before Honorable Burton J. Wyman, Referee in Bankruptcy; that said automobile was sold to one George Field, sale to said George Field being confirmed by said Referee in Bankruptcy;

That your petitioner has demanded of said Albert C. Schoening, bankrupt herein, that he turnover to your petitioner the ownership certificate for said 1952 Nash 4-door Statesman automobile, but that said Albert C. Schoening has failed and refused to turnover the same.

That on the date that he filed his petition in bankruptcy, said bankrupt had not filed his federal income tax return for the year 1956; that right to any refund of income tax for the year 1956 for which said bankrupt could make claim against the Director of Internal Revenue, passed to your petitioner upon the filing of the petition in bankruptcy herein;

That your petitioner has demanded of said bankrupt that he turnover to your petitioner a copy of the federal income tax return for the year 1956 filed with the Director of Internal Revenue by Albert C. Schoening, bankrupt herein, and has demanded that said bankrupt turnover to your petitioner any refund of income tax received by said bankrupt by reason of over-payment of his income tax for the year 1956, but that said bankrupt has failed and refused to turnover the same.

Wherefore, your petitioner prays for an order directing Albert C. Schoening, bankrupt herein, to turnover to Kal W. Lines, Trustee, the ownership certificate for 1952 Nash 4-door Statesman automobile, a copy of the federal income tax return for the year 1956 filed by said Albert C. Schoening, and any refund of income tax received by said Albert

C. Schoening by virtue of said federal income tax return for the year 1956; for costs incurred herein and for such other relief as may be just and proper in the premises.

/s/ KAL W. LINES,
Trustee.

United States of America,
Northern District of California,
City and County of San Francisco—ss.

I, Kal W. Lines, the petitioner named in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information and belief.

/s/ KAL W. LINES.

Subscribed and Sworn to before me this 8th day of August, 1957.

[Seal] /s/ EDNA H. SMITH,
Notary Public, in and for the City and County of San Francisco, State of California.

Affidavit of service by mail attached.

[Endorsed]: Filed August 8, 1957.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Upon the consideration of the verified petition of Kal W. Lines, for order directing Albert C. Schoen-

ing, bankrupt herein, to turnover to said Trustee the federal income tax return for the year 1956 filed by said Albert C. Schoening, and any refund of income tax received by said Albert C. Schoening, also the ownership certificate for 1952 Nash 4-door Statesman automobile, and good cause appearing therefor,

It Is Hereby Ordered that Albert C. Schoening, bankrupt herein, personally be and appear before the undersigned Referee in Bankruptcy, at his court room, Room 609, Grant Building, 1095 Market Street, San Francisco, California, in said district, at the hour of 2:00 o'clock p.m., on the 22nd day of August, 1957, then and there to show cause, if any he has, why the prayer of said petition should not be granted; and

It Is Further Ordered that service of this order may be made upon said Albert C. Schoening by mailing a true copy of this order, together with a true copy of said petition to said Albert C. Schoening at 2034 - 23rd Avenue, San Francisco, California, in said district, at any time not less than three (3) days prior to the aforesaid return date thereof.

Dated: San Francisco, in said district; August 8, 1957.

/s/ BURTON J. WYMAN,
Referee in Bankruptcy.

[Endorsed]: Filed August 8, 1957.

[Title of District Court and Cause.]

ANSWER OF NORMA SCHOENING TO PETITION FOR TURNOVER ORDER

Comes Now Norma Schoening and voluntarily appearing in response to the Petition for Turnover Order heretofore filed herein on the 8th day of August, 1957, by Kal W. Lines, Trustee, of the Estate of the above-named bankrupt and answers said petition as follows:

1. This respondent alleges that by virtue of claim for refund thereof endorsed upon the joint United States individual income tax return filed by this respondent and the above-named bankrupt, her husband, for the calendar year 1956 there became due by the United States and that there was transmitted by the Director of Internal Revenue for the First California District refund Treasury check payable to the joint order of the above-named bankrupt and this respondent in the sum of $968.92, which is in the possession of this respondent and said bankrupt.

2. That, as more particularly appears from the said 1956 individual income tax return, said refund, to the extent of $613.92 represents deductions made by F. W. Woolworth Company, by whom this respondent was employed during the said year 1956, from her earnings, and that said sum was at all times and still is a part of the earnings of this respondent for her personal services rendered as an employee of said F. W. Woolworth Company during the said year 1956.

time the parties appeared once again, personally and/or by their respective attorneys of record, and the court being fully advised, now makes the following findings of fact and conclusions of law:

Findings of Fact

1. That at all times relevant to this case, Albert C. Schoening and Norma Schoening were husband and wife.

2. That during the year 1956, the said Norma Schoening was employed by F. W. Woolworth Company; that she received from said company total wages of $3,410.76 for said year; that said company withheld for taxes from the wages of said Norma Schoening the sum of $619.92;

3. That the said Albert C. Schoening and Norma Schoening filed a joint Federal Income Tax Return for the year 1956, which return has been received in evidence;

4. That during the said year of 1956, the combined earnings of the said Albert C. Schoening and Norma Schoening were $3,875.36;

5. That during the same year, the said persons incurred losses totalling $5,133.38, and that the combined net loss of the two said individuals for the said year was therefore $1,258.02; that said net loss resulted from the business operations of Albert C. Schoening, the bankrupt herein;

6. That subsequent to the filing of the said joint tax return, the United States Government refunded to the said Albert C. Schoening and Norma Schoening the sum of $968.92; that the said refund was on account of overpayment of the liability owed by the said two individuals; that the said sum of $613.92 withheld from wages of Norma Schoening was included in the said refund; that said sum of $968.92 was refunded as a result of the business loss of Albert C. Schoening, bankrupt herein, and which business loss was included in said claim for refund;

7. That the withholding of the said $613.92 from wages of said Norma Schoening and the payment of the said sum to the United States Government by her employer was for and on account of the combined tax liability of the said Norma Schoening and Albert C. Schoening; that following the withholding of the said sum, Norma Schoening exercised no control whatsoever over the said funds; that the said funds were commingled with funds withheld from other wage earning taxpayers and particularly with the sum of $355, which latter sum was composed of $55 withheld from wages of Albert C. Schoening and $300 paid by the Albert C. Schoening as part of his estimated tax for the year 1956;

8. That the refund by the United States Government of the sum of $968.92 was made to the said Albert C. Schoening and Norma Schoening because they filed a joint income tax return for the said year 1956;

From the foregoing facts, the court makes the following conclusions of law:

Conclusions of Law

1. That the wages earned by Norma Schoening, wife of the bankrupt herein, during the year 1956, were, at all times relevant herein, community property of said Norma Schoening and Albert C. Schoening, bankrupt herein.

2. That at the various times when the sums totalling $613.92 were withheld from the wages of Norma Schoening and thereafter turned over by her employer to the United States Government said funds, so withheld, lost their identity as earnings and/or wages of the wife (Norma Schoening) and that said Norma Schoening thereupon lost all control over said funds so withheld from her wages.

3. That the said sum of $613.92, which was withheld from the wages of Norma Schoening, wife of the above-named bankrupt, was, when paid to the United States Government by her employer, comingled with the funds of other taxpayers and particularly with funds of the said Albert C. Schoening, bankrupt herein.

4. That when the sum of $968.92 was refunded to Albert C. Schoening and Norma Schoening, by the United States Government, as a tax refund, the sum of $613.92 included therein was not a refund of wages to Norma Schoening, but was, on the contrary, a refund of the overpayment of tax paid by

Albert C. Schoening and Norma Schoening jointly, and that said refund was made to said persons jointly, as community property, and as a result of the tax loss claimed by said persons jointly, for the year 1956.

5. That the trustee in bankruptcy in the above-entitled matter, Kal W. Lines, is entitled to said tax refund, made payable to Albert C. Schoening and Norma Schoening, in the amount of $968.92 and is entitled to an order directing said bankrupt and his wife, Norma Schoening, to turn over said sum to said trustee.

Whereby It Is Ordered, Adjudged and Decreed that Albert C. Schoening and Norma Schoening, and their agents, employees and attorneys, be, and they hereby are, ordered to turn over to Kal W. Lines, Trustee herein, said income tax refund in the amount of $968.92 and/or turn over to said trustee a sum in cash equivalent thereto, said sum to be turned over to said trustee within ten (10) days from the date of this order.

Dated: August 4, 1960.

/s/ LYNN J. GILLARD,
Referee in Bankruptcy.

Affidavit of Service by Mail attached.

Lodged July 28, 1960.

[Endorsed]: Filed August 4, 1960.

[Title of District Court and Cause.]

PETITION FOR REVIEW

Comes now Norma Schoening, wife of the above-named Bankrupt, and respectfully represent:

I.

That your Petitioner is a party aggrieved by the Findings of Fact, Conclusions of Law, and Order heretofore made and entered herein by Honorable Lynn J. Gillard, Referee in Bankruptcy of the above-entitled Court, on the 4th day of August, 1960, a full, true and correct copy of which said Order is hereto annexed, marked Exhibit "A," and hereby expressly referred to and made part hereof.

II.

That the aforesaid Order, wherein and whereby Petitioner was required to pay over to Kal W. Lines the sum of $613.92 from the income tax refund received by your Petitioner and the Bankrupt above named as in said Order described, was and is erroneous in each and all of the following particulars, viz.:

(a) That the Findings of Fact made by said Referee in and to support his said Order of August 4, 1960, numbers 6 and 7, are not supported by, and are contrary to, the evidence adduced by the respective parties upon said Trustee's Petition for Turnover Order and your Petitioner's Answer thereto.

(b) That the Conclusions of Law drawn from said Findings of Fact by said Referee in and to support his said Order of August 4, 1960, numbers 2, 3, 4 and 5, are not supported by the said Findings of Fact nor any thereof, nor by the evidence so adduced as aforesaid, before said Referee.

(c) That, contrary to the said Findings and Conclusions of said Referee as set forth in said Referee's Order of August 4, 1960, the sum of $613.92, which was withheld from the wages of your Petitioner and thereafter turned over by her employer to the United States government, did not and could not lose its identity as portions of her said earnings, nor did your Petitioner lose all or any control thereover by reason of the filing of the joint tax return with her husband, the Bankrupt above named; and that, at all of the times herein and in said Referee's Order mentioned, said sum of $613.92 was and is a part of the earnings of your Petitioner for her personal services rendered for her employers during the year 1956 and neither were nor are subject to any of the debts of the above-named Bankrupt, in that as more particularly appears from all of the evidence adduced before said Referee in Bankruptcy, none of said Bankrupt's indebtedness at the time of the commencement of the above-entitled proceedings was incurred for necessaries of life furnished by his creditors either to your Petitioner or to said Bankrupt, her husband.

Wherefore your Petitioner prays that the afore-

said Order herein made by the said Referee in Bankruptcy on the said 4th day of August, 1960, insofar as it requires your Petitioner to turn over to said Trustee the sum of $613.92, be reviewed by a Judge of the above-entitled Court in accordance with the provisions of Section 39-c of the Bankruptcy Act, and that said Order be, by said Judge, reversed, with instructions to said Referee in Bankruptcy to make and enter herein an order denying said Trustee's Petition for Turnover Order insofar as said sum of $613.92 is concerned; or for such other and further order as may be just and proper in the premises.

NORMA SCHOENING,

By /s/ ARTHUR P. SHAPRO,
One of Her Attorneys.

Affidavit of Service by Mail attached.

Duly verified.

[Endorsed]: Filed August 15, 1960.

[Title of District Court and Cause.]

HEARING ON PETITION FOR TURNOVER ORDER

Thursday, July 7, 1960—10:00 A.M.

Appearances:

For the Trustee:
KAL W. LINES,
Trustee.

For the Respondent, Norma Schoening:
SHAPRO & ROTHSCHILD, by
ARTHUR P. SHAPRO, ESQ.

The Referee: The matter of Albert C. Schoening.

Mr. Shapro: Ready for the respondent, Mrs. Schoening.

Mr. Lines: The Trustee is appearing on his own behalf on that, your Honor. Mr. Carter wasn't available this morning, and so far as the Trustee is concerned, we will submit the matter as it now stands directly before the Court. I think there is nothing to be added. Factually, I think there is no question of credibility.

There is nothing but the question of law involved. There was no testimony taken. We stipulated as to the facts and I will respect the views as to the law under the facts that have already been submitted in the form of short briefs, and the respondent has no objection. In fact, the respondent would invite and consent to the matter being resubmitted to your Honor upon the record.

The Referee: There was a petition by the Trustee for a turnover order with reference to both the tax and a Nash Sedan.

Mr. Lines: The Nash Sedan was turned over——

Mr. Shapro: ——was turned over. That was not an issue.

The Referee: The petition was directed to Albert C. Schoening to turn over any refund of income tax received by Schoening. In response thereto,

there was an answer filed by Norma Schoening, and she voluntarily appeared and alleged that there was a joint check from the Director of Internal Revenue—a check payable jointly to Norma Schoening and Albert C. Schoening in the amount of $613.92—which check is in the possession of both of them; and that the refund to the extent of $613.92 represents deductions made from her salary while employed by the F. W. Woolworth Company.

There is no contest as to the accuracy of that fact?

Mr. Lines: None whatsoever.

Mr. Shapro: None whatsoever.

The Referee: That the $613 is in essence her wages and therefore should be turned over to her. The matter was apparently argued in brief, the Trustee's memorandum setting forth what the facts were as stipulated by the parties. Is there any disagreement as to what the facts are as covered by that stipulation?

Mr. Shapro: No, your Honor. Our reply memorandum indicates that we are in accord with the facts as stated.

The Referee: There was no stipulation with reference as to whether or not there are any community debts of the parties. I do not see any community debts listed on the schedules, but I think that I should have your stipulations as to whether or not there are any community debts with reference to the necessities of life.

Mr. Lines: The Trustee on that would stipulate that there are no community debts—or phrasing it

differently, no debts for the necessities of life—scheduled on the Schedules of the Bankrupt; nor has there been any evidence that there are such debts.

Mr. Shapro: We will accept that stipulation in joint interest, your Honor.

* * *

(Proceedings concluded in Book II.)

[Endorsed]: Filed August 29, 1960.

In the Southern Division of the United States District Court for the Northern District of California

No. 47987 in Bankruptcy

In the Matter of:

ALBERT C. SCHOENING,

Bankrupt.

Before: Honorable Lynn J. Gillard,
Referee in Bankruptcy.

Thursday, July 7, 1960—10:00 A.M.

HEARING ON PETITION FOR TURNOVER ORDER

Reporter's Partial Transcript

Appearances:

For the Trustee:
KAL W. LINES,
Trustee.

For the Respondent, Norma Schoening:
SHAPRO & ROTHSCHILD, by
ARTHUR P. SHAPRO.

The Referee: Well, then, I have Respondent's Reply Memorandum on this. If you are willing to submit the matter on that record, I think I am ready to dispose of this thing, although it is not easy, but decision is better than indecision.

I don't think that Section 168 was designed to reach this kind of a situation and I do not find any case in which property which has been divested from the control of the wife can contain the protection as earnings which is afforded by Section 168.

In this case, by operation of law, the wife has to pay withholdings on her wages. Actually, she is not liable in her individual capacity for the tax on all of her earnings. Her earnings are community property and the husband is liable for tax on one-half thereof; and if the parties were to file separate returns, the husband would have to report and pay tax on one-half of her earnings. With a joint return, they become jointly and severally liable for the entire amount of tax that is due on their return.

After the money had been paid to the District Director and if there is a refund, the wife could not get back—even if the refund is in excess of the amount withheld from her wages—the wife could not get back the amount of $613 from the District Director. The refund would only be made payable

in the manner it has here, to wit: A check for the total amount payable jointly to them. In my view, that refund is community property, which under Section 172, I believe, is subject to the demand and the control of the husband. I don't think that it is wages of the wife subject to her control under Section 168.

Now, the only case that I have found in which the Supreme Court has allowed a tracing—or the Courts have allowed a tracing of the funds of the wife, is in Street vs. Bertolone. In every other case they talk about the idea that if there is a traceability, there is a possibility that the wife's earnings will retain the 168 character, but that is indicative of those cases.

In the Street vs. Bertolone, it went up not on a fact issue but a pleading issue, wherein the complaint alleged that the wife had in her possession property which was purchased with her earnings, which is a complete segregation situation and not a divestment of control by the wife. The complaint there alleged that she had property which she purchased with her earnings, so that this is the strongest possible case. Now, the Court specifically said in that case that the contention of the creditor that under that Section—even though the earnings of the wife are incorporated with other community property—they will forever remain exempt from the community creditors, was without foundation.

So, there is no case law to support the position which the wife has tried to maintain here. In my view, 168 has no application after the earnings have

been converted in such a fashion that they are no longer within the wife's control, are mingled with community funds and thereafter returned to the parties—in this case as community property.

I suppose we should have this set up in the form which will preserve the record in case you want an appeal. The Trustee should submit findings and conclusions. I think we should probably follow the procedure set forth in the rules of Court. Those findings should be submitted within five days and if there is an objection thereto, counter findings should be submitted by the attorney for Mrs. Schoening within five days—findings and conclusions to be consistent with the data expressed here. If you want to take this up, I will give you the broadest possible ground.

Mr. Shapro: Frankly, your Honor, not only in this case now, but in another one, I think that this matter will be reviewed, so that the record should be as broad as possible under the circumstances.

The Referee: I have made my findings on that record and I will make it the dual finding: (1) That Section 168 has no application where the wife has allowed the funds—her earnings—to be removed from her exclusive control or possession——

Mr. Shapro: On the basis of the payment——

The Referee: ——and converted to some other form of property; and (2) that the refund check submitted by the Internal Revenue Service is not a refund of wages.

Mr. Shapro: There are two separate points involved.

The Referee: Correct. A refund of wages and a refund of community property.

[Endorsed]: Filed July 14, 1960.

In the United States District Court for the Northern District of California, Southern Division

No. 47987 in Bankruptcy

In the Matter of:

ALBERT C. SCHOENING,

Bankrupt.

ORDER REVERSING REFEREE'S DECISION REQUIRING TURNOVER OF FEDERAL INCOME TAXES REFUNDED TO BANKRUPT'S WIFE

On August 8, 1957, Kal W. Lines, the trustee in bankruptcy for bankrupt Albert Schoening, petitioned the Referee in Bankruptcy for a turnover order of, among other assets, "* * * any refund of income tax received by said bankrupt by reason of over-payment of his income tax for the year 1956 * * * (or) * * * any refund of income tax received by said (bankrupt) by virtue of said federal income tax return for the year 1956; * * *"

On August 8, 1957, an order to show cause was issued and the matter came on for hearing before Lynn J. Gillard, Referee in Bankruptcy, on July 7, 1960.

The sum in issue is $613.92 which was refunded by the Internal Revenue Service in a check made payable to both the bankrupt and his wife, petitioner herein, by reason of the filing of a joint return.

It is agreed between the parties that Norma Schoening, petitioner herein, is, and was during the period in question, the wife of the bankrupt, and that the petitioner and the bankrupt were living together as husband and wife during 1956. Petitioner was an employee of Woolworth Company and during the year 1956 had certain sums withheld from her wages by her employer pursuant to Section 3402 of the Internal Revenue Code of 1954. Petitioner filed a joint return with her husband for the year 1956, and in 1957 received a check, made payable to Albert Schoening and Norma Schoening, from the Internal Revenue Service, in the amount of $968.92, of which the sum of $613.92 represented sums withheld from her wages at Woolworth's. The remainder, $355.80, is not in issue. It represented tax refunds of the bankrupt for estimated tax paid and earnings withheld.

The order appealed from declares that the sum of $613.92 is community property subject to the debts of the bankrupt, and directs that it be turned over to the trustee.

It is the petitioner's contention that while such sum is community property, it is not subject to the husband's debts, other than those incurred for

necessaries, because the earnings of the wife are exempt under Cal. Civ. Code Section 168. The section is as follows:

> "The earnings of the wife are not liable for the debts of the husband; but, except as otherwise provided by law, such earnings shall be liable for the payment of debts, heretofore or hereafter contracted by the husband or wife for the necessities of life furnished to them or either of them while they are living together.
>
> Cal. Civ. Code § 168 (1937).

It is stipulated that there is no claim that the debts of the husband are for necessaries. (Transcript of hearing, page 3, lines 23-26, page 4, line 1.)

The issues presented to this court are whether sums withheld by an employer and transmitted to the Federal Government are exempt earnings, and, if so, whether they retain their exempt status in the circumstances of this case.

The sums withheld by petitioner's employer, the Woolworth Company, represented "wages" of the employee and are earned income used to prepay or deposit on account with the United States amounts of potential future tax liability. It is clear that the amounts withheld have the character of earnings, in that they constitute part of the payment for the employee's services. The amount that the employee has received "in hand," plus the amount withheld, equal the employee's full wage.

United States Fidelity & Guaranty Co. v. United States, 201 F. 2d 118 (1952).

It is the contention of the trustee that although the sums withheld are, in fact, wages, when withheld, they lose such character when transmitted to the Collector of Internal Revenue, as they are then being used by the employee for the payment of a debt due another (the Government).

While the language of the Internal Revenue Code speaks in terms of "payment" and "refund of overpayment," thus perhaps supporting such a theory in a tax setting, the characterization of property under the law of federal taxation can not change the law of California, nor does a characterization of property by the federal tax authorities control the determination of the property's status in regard to the community property law. Grolemund v. Cafferata, 17 C. 2d 679, 689 (1941).

It being established that the sums withheld represent earnings of the wife when withheld, the questions remaining are three:

(1) Is the exempt status of the funds lost by a comingling with funds of other taxpayers and the bankrupt's?; or

(2) In comingling, has the petitioner waived the exempt status of the funds?; or

(3) Has a waiver of such exempt status occurred by virtue of the filing of a joint return by the petitioner and bankrupt?

It is the trustee's contention that if the sums are still the wife's earnings as defined by Section 168 of the Civil Code after being withheld and transmitted to the Collector of Internal Revenue, they lose their exempt status by being comingled with the husband's (and other taxpayer's) funds in the withholding pool.

It is not necessary to hold the earnings separate and apart from any other funds in order for them to retain their character. It is suggested by the Referee that such a rule is stated by Street v. Bertolone, 193 Cal. 755 (1924). The case, however, does not hold that the earnings of the wife must be held separate and apart in order to retain their exempt status in all circumstances.

Where community funds are mingled with other funds, the respective funds remain unchanged in character so long as they can be clearly ascertained. Faust v. Faust, 91 C.A. 2d 304 (1949); Estate of McGee, 168 C.A. 2d 670 (1959). This is settled in application under California law. Therefore, in ascertaining the character of funds, as here, the controlling principle is not whether the funds have been comingled, but rather whether, if comingled, they are incapable of now being ascertained in their respective original character. In the instant case, the ascertainment of identity is even less difficult than where the funds have been invested into other property or goods. The sums withheld were identifiable as to amount. When placed with other

monies by the Collector of Internal Revenue they were, as to amount, always readily identifiable. When returned by refund check they were still, as to amount, clearly identifiable. It therefore follows that, while the funds were placed with other funds —those of other taxpayers and those of her husband's—the character of earnings, exempt under Section 168 of the Civil Code, was still attributable to the amount originally contributed by the wife.

The trustee's next contention is that a waiver of the exempt status has occurred by reason of the transmittal of the funds of the Collector of Internal Revenue and the subsequent comingling. This suggests to the trustee that by using "* * * a portion of his (the employee's) earnings for the payment of a debt due another," and by parting with the portion, "* * * such money * * * loses all its previous characteristics and identity as earnings." (Points and Authorities, page 6.) This point appears to be based on an incorrect concept of waiver. In order for there to be a waiver there must be the voluntary relinquishment of a known right, Johnson v. Zerbst, 304 U.S. 458 (1937). They are required by the Internal Revenue Code and no control over the matter is given, nor can any be obtained, by the employee. (Sec. 3402, I.R.C. 1954.) Therefore, these acts alone could not be said to constitute waiver.

Examining the conduct subsequent to the transmittal of funds to the Collector, it becomes clear

that no waiver has occurred. The trustee contends that conduct can infer a waiver and relies upon Truelsen v. Nelson, 42 C.A. 2d 750 (1941).

The Truelsen case holds that the character of the earnings can be lost where they are "* * * so mingled with (other property) as to lose their identity." But this case, and others dealing with the same problem, does not hold that where the identity is ascertainable, as here, that mere comingling is sufficient to bring the Truelsen rule into play. The cases require that to have a waiver there must be a mingling sufficient to obliterate the separate character identity within the mass. "The exemption of the wife's earnings under section 168 of the Civil Code may be waived and is waived where such earnings are so mingled with community property as to lose their identity." Tedder v. Johnson, 105 C.A. 2d 724 (1951) (emphasis added); Pfunder v. Goodwin, 83 C.A. 551 (1927); Tinsley v. Bauer, 125 C.A. 2d 724 (1954). Therefore, even if it were to be assumed that the withheld sums were voluntarily comingled, there would still be lacking the elements of waiver under the Truelsen rule.

There would not be here, as there was in Truelsen, conduct inferring relinquishment of the right to keep such earnings exempt under Civil Code Sec. 168. The court in Truelsen found that by mingling funds without reference to source and withdrawing funds without reference to which funds were being withdrawn that the parties had acted in a way contrary to a desire to obtain the

benefits of the rights conferred by Sec. 168, and, therefore, indicated, by conduct, a desire to relinquish the right.

As to the third question—has the petitioner, by virtue of filing a joint return with her husband, waived the status of the funds?—we find that the filing of the joint return does not change the ownership or character of any property or funds between the husband and wife. The mere filing of the joint return does not operate as conduct from which a waiver can be inferred under the comingling cases discussed supra, and therefore it does not vest in the community any part of the subsequent tax refund attributable to the wife's earnings as property subject to the husband's debts for other than necessaries. In Matter of Illingworth, Case No. B37952, District Court of Oregon, July 17, 1956; Snedecor, Comment on Income Tax Refunds, 30 Journal of National Association of Referees 135 (1956).

The fact that the check is made payable by the Government to both petitioner and her husband does not change the result. Illingworth, supra.

It Is Therefore Ordered that the Referee's order made on the 4th day of August, 1960, insofar as it requires petitioner to turn over to said Trustee the sum of $613.92 be reversed, and that the Referee make his order herein denying Trustee's Petition for Turnover Order insofar as said sum of $613.92 is concerned.

Dated: December 28, 1960.

/s/ ALBERT C. WOLLENBERG,
United States District Judge.

[Endorsed]: Filed December 28, 1960.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Shapro, Anixter & Aronson, Attorneys at Law, 1450 Chapin Avenue, Burlingame, California.

Notice Is Hereby Given that Kal W. Lines, trustee of the estate of the above-named bankrupt, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the order, dated December 28th, 1960, of Honorable Albert C. Wollenberg, reversing Referee's decision requiring the turnover of federal income taxes refunded to bankrupt's wife.

Dated: January 24th, 1961.

/s/ BOYD W. CARTER,
Attorney for Trustee.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 25, 1961.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, James P. Welsh, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents listed below, are the originals filed in this court in the above-entitled case and that they constitute the record on appeal herein as designated by the Attorneys for the Appellant:

Certificate and report of the Referee relative to petition for Review of Order dated August 4th, 1960, including all documents and transcripts handed up therewith.

Order of the Honorable Albert C. Wollenberg, dated December 24, 1960, reversing Referee's decision.

Notice of Appeal, filed January 25, 1961.

In Witness Whereof, I Have Hereunto Affixed the Seal of the Above-Entitled Court This 6th Day of March, 1961.

[Seal] JAMES P. WELSH,
Clerk,

By /s/ GROVER M. KELLEY,
Deputy Clerk.

[Endorsed]: No. 17309. United States Court of Appeals for the Ninth Circuit. Kal W. Lines, Trustee in the Estate of Albert C. Schoening, Appellant, vs. Norma Schoening, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed March 4, 1961.

Docketed March 20, 1961.

/s/ FRANK H. SCHMID,
Clerk of the United States Court of Appeals for the Ninth Circuit.

U. S. Court of Appeals
for the Ninth Circuit

No. 17309

KAL W. LINES, Trustee of the Estate of ALBERT C. SCHOENING,

Appellant,

vs.

NORMA SCHOENING,

Appellee.

APPELLANT'S DESIGNATION OF RECORD TO BE PRINTED ON APPEAL AND DESIGNATION OF POINTS

To Frank H. Schmid, Clerk of the Above-Entitled Court:

Comes now Kal W. Lines, trustee of the estate of Albert C. Schoening, Bankrupt, and designates the following as the record to be printed herein:

1. The clerk's transcript in its entirety, as transmitted to you, including Referee's certificate on review, all documents and transcripts submitted therewith, the order herein appealed from and Notice of Appeal.

Appellant further designates the following of his points on appeal:

1. Erroneous conclusions of fact and law upon which the District Judge, Honorable Albert C. Wol-

lenberg, based his ruling that the portion of an income tax refund, attributable to the earnings of bankrupt's wife, is not subject to the debts of the husband, and is not an asset of the bankrupt's estate to be administered therein, and upon which an order was made revising the order of the Referee whereby it was directed that the sum of $613.92 be turned over to the trustee by Norma Schoening.

Dated: April 25, 1961.

/s/ LLOYD W. CARTER,

Attorney for Kal W. Lines,
Appellant.

[Endorsed]: Filed April 26, 1961.

No. 17310

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SOUTHERN CALIFORNIA ASSOCIATED NEWSPAPERS, A CORPORATION D/B/A SOUTH BAY DAILY BREEZE, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STUART ROTHMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
MARCEL MALLET-PREVOST,
Assistant General Counsel,
ALLISON W. BROWN, JR.,
JUDITH BLEICH KAHN,
Attorneys,
National Labor Relations Board.

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AUTHORITIES CITED

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In the United States Court of Appeals for the Ninth Circuit

No. 17310

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SOUTHERN CALIFORNIA ASSOCIATED NEWSPAPERS, A CORPORATION D/B/A SOUTH BAY DAILY BREEZE, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court on petition of the National Labor Relations Board for enforcement of its order issued against respondent on February 9, 1961, pursuant to Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151 *et seq.*).[1] The Board's decision and order (R. 20-26)[2] are reported at 130 NLRB No. 14.

[1] The relevant statutory provisions are reprinted *infra*, p. 14.

[2] References to portions of the printed record are designated "R." Whenever a semicolon appears, the references preceding the semicolon are to the Board's findings; those following are to the supporting evidence.

This Court has jurisdiction under Section 10(e) of the Act, the unfair labor practices having occurred in Redondo Beach, California, where respondent is engaged in the business of publishing, selling and distributing a daily newspaper (R. 8; 3-4, 7, 251).

STATEMENT OF THE CASE

I. The Board's Findings of Fact

Briefly, the Board found that respondent, in violation of Section 8(a)(1) and (3) of the Act, questioned employee David Clark about his union membership and thereafter discriminated against him in an effort to impede or delay union organization of its mailroom. The subsidiary facts upon which these findings rest may be summarized as follows:

Clark first worked for respondent for about a 3-year period commencing in 1954 (R. 9; 38, 58-59, 253). At that time his job consisted of delivering newspapers to homes under the supervision of various district managers, including Walter Collins, who subsequently became respondent's circulation manager (R. 9; 251, 253). In July 1958, Clark began working full-time for respondent as a fly boy (R. 9, 20; 38). The duties of a fly boy consist of taking newspapers from the press, or from the conveyor leading from the press, to the mailroom and there preparing mailing wrappers for them (R. 9, 20; 39, 66-67).

In December 1959, the time of the incidents herein, respondent's mailroom employees were not represented by a union (R. 301). Clark's rate of pay in December 1959 was $1.50 an hour (R. 10; 59, 106, 257). This was less than half the rate unionized mailing employees in

the Los Angeles area were then receiving (R. 10; 107-108). Because of this disparity in wages, as well as dissatisfaction with other conditions of his employment, Clark met with an organizer for the Union[3] on Tuesday, December 15, and joined the organization (R. 10; 40, 118-119, 182).

Within a day or two after Clark joined, a representative of the Union visited respondent's plant (R. 15-16; 259-260). Circulation Manager Collins, who supervised the mailroom, including Clark, heard about the visit and also about the fact that Clark's membership had been solicited (R. 9, 16; 40, 251-253, 259-260, 261). On Friday, December 18, Collins asked Clark whether he had been contacted by the Union (R. 12, 20; 40-41, 261). When Clark replied affirmatively, Collins wanted to know what the union representative had spoken to him about, what Clark thought of the Union, and whether Clark had a union card (R. 12; 41, 261). Clark told Collins what he and the union representative had talked about, and Clark stated that he thought the Union was a "good deal" (R. 41).[4]

The following day, Saturday, December 19, Collins for the first time offered Clark a "trainee" position, which had never before existed, in respondent's circulation department (R. 12; 42-43, 162). In contrast to the fly boy job, which was entirely inside the plant, the trainee position would entail traveling away from respondent's premises with the various district circu-

[3] Mailers Union, Local 9, International Typographical Union, AFL-CIO.

[4] Later the same day, Collins made inquiries of respondent's publisher, Curry, to find out whether the Union had been in touch with him about representing the mailroom employees (R. 262, 295).

lation managers, in order for the trainee to become familiar with the district managers' job of promoting business and supervising boys who deliver papers to homes (R. 65-68, 252, 272-273). The trainee also was to assist the district managers whose duties included, in addition to soliciting business, providing carriers with newspapers and receiving money they collected, and tying and bundling newspapers for the various routes (R. 65, 272-273, 312). The effect of Clark's taking the trainee position would have been to remove him from the mailroom group which the Union was attempting to organize—a group which included employees who performed inside functions only.[5]

That same day, shortly after the trainee position had been offered to Clark, Collins, in a discussion with Clark's father, stated that he knew at the time he offered young Clark the trainee position that he was a member of the Union (R. 110, 300).[6] Collins added that he did not want the Union in the mailroom because he wanted complete control of it, that there was no need for a union at that time, and that when there was

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[5] In accordance with the statement of the Union's jurisdiction set forth in its constitution, the Union was not seeking to represent respondent's district managers and no effort was made to recruit them into the organization (R. 156, 175-179, 195, 200-201, 319-320). Contracts held by the Union with other newspapers comparable to the size of respondent's in the Los Angeles area cover only employees who work in the "newspaper plant between the time that the newspaper is printed and the time it is delivered to the dealers' trucks" (R. 153-154, 156, 158, 200, 203). The Union's contract with Hillbro Newspaper Printing Company, introduced in evidence by respondent, illustrates the organization's jurisdictional policy of limiting coverage to individuals who work on the employer's premises (R. 154, 203-205, 328-329).

[6] Collins testified that he was aware that Clark's father was also "a union man" (R. 283).

need for it the mailroom employees would be unionized (R. 110-111, 301).

On the next working day, Monday, December 21, Collins told Clark that if he did not accept the trainee job he could not keep his job as a fly boy (R. 13; 44, 46, 80, 95). Clark refused the transfer, and his employment was terminated immediately (R. 21, 13; 46-47, 48, 87). At the time of Clark's termination, no new fly boy had been hired to replace him (R. 21; 46-47). The following day when Clark returned to the plant to pick up his check, Collins again brought up the subject of the Union by stating, "We're not big enough to be union. Maybe some day, but not right now" (R. 48-50, 288-289, 301).

II. The Board's Conclusions and Order

Upon the foregoing facts, the Board, in disagreement with the Trial Examiner, found that respondent violated Section 8(a)(3) and (1) of the Act by offering employee David Clark a transfer and, upon his refusal thereof, discharging him. The Board concluded that respondent's treatment of Clark was discriminatory and violative of the Act because it was motivated by a desire to delay or impede union organization of the mailroom and that it was undertaken in the belief, on Collins part, that it would accomplish that result.[7]

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[7] The Trial Examiner recommended dismissal of the complaint on the grounds (1) that since the job offered Clark was more attractive than the one he then held, the action did not inhibit union organization; and (2) that Collins was mistaken in believing that if Clark accepted the new job he could no longer be represented by the Union (R. 18-19). Since, it is evident that the Board's reversal of he Trial Examiner stems from its disagreement with him as to the conclusions to be drawn from established facts, and

The Board further found that respondent violated Section 8(a)(1) of the Act by Collins' questioning of Clark about his union membership (R. 21-22). The Board ordered respondent to cease and desist from the unfair labor practices found, to reinstate Clark with backpay and to post appropriate notices (R. 23-24).

ARGUMENT

Substantial Evidence Supports the Board's Finding That Respondent, in An Effort to Impede Unionization of Its Employees, Discriminated Against Employee David Clark, and Thereby Violated Section 8(a)(3) and (1) of the Act.

The key factual determination in this case, on which both the Board and Trial Examiner are in agreement, is that "Collins believed taking Clark out of the mailroom would delay or impede Union organization, and that upon learning of Clark's Union membership Collins refused to permit him to continue his current job in the mailroom based on the belief that the new job might prevent him from being represented by the Union" (R. 21, 17). It is plain from the evidence summarized in the Statement, *supra,* that this finding is supported by the record. Thus, for a year and a half Clark had been employed by respondent as a fly boy, but immediately upon Collins' learning that Clark had joined the Union, and that there was a danger of the Union's achieving representation rights in the mailroom, Collins offered Clark another job to get him

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the Examiner's credibility findings were left undisturbed, the Board's action in reversing him does not impair the validity of its findings. *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 493-496; *F.C.C.* v. *Allentown Broadcasting Corp.*, 349 U.S. 358, 364; *J. I. Case Co.* v. *N.L.R.B.*, 253 F. 2d 149, 155-156 (C.A. 7).

out of that phase of respondent's operations. Nor was there anything indirect about Collins' handling of the matter. The offer was made to Clark on a "take-it-or-else" basis and when Clark on the next workday turned down the offer, he was discharged on the spot—and this despite the fact that he had been employed by respondent on a full or part-time basis for four and a half years. Such summary and harsh treatment of Clark, a long-time employee, hardly bespeaks the concern for Clark's welfare which Collins asserted motivated him in his dealings with the employee over the years (R. 255, 279). Rather, it attests to the overriding concern with which Collins viewed the threat of unionization in the mailroom, and the urgency with which he sought to meet the threat.

Respondent, before the Board, denied that the timing of Collins' job offer to Clark gives rise to an inference that union considerations influenced the action. But "[i]t stretches credulity too far to believe that there was only a coincidental connection between" Clark's joining the Union on Tuesday, Collins' interrogation of him about the matter on Friday, and the "abrupt" move to take him out of the mailroom on Saturday, at a time when there was no one else available to perform his work. *Angwell Curtain Co. Inc.* v. *N.L.R.B.*, 192 F. 2d 899, 903 (C.A. 7).[8]

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[8] The Trial Examiner properly characterized as "spurious" (R. 17) Collins' testimony that he received the publisher's approval for the establishment of the trainee position on December 15, but that he waited until December 19 to tell Clark about it (although Clark was at work during all the intervening days), because the 19th was the day the transfer to the new job would have taken effect, and it

The fact that union considerations were the dominant reason for offering the trainee job to Clark is further revealed by Collins' course of conduct in connection with the incident. Thus, Collins' close questioning of Clark on December 18 about the Union is evidence of the importance that Collins attached to Clark's union adherence.[9] The day of the discharge Collins, in conversation with Clark's father, stated that he was aware of the son's union membership, and further asserted that he "didn't want the Union in the mailroom because he wanted complete control of [it]" (R. 110-111). Finally, Collins' conduct toward Clark on the day the latter returned to the plant to pick up his check is additional evidence that the threat of unionization was the motivating factor in the decision to remove Clark from the mailroom. Thus, after asking Clark whether he had changed his mind about

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was Collins' custom to inform an employee after a new rate took effect (R. 13-14; 275-278, 294, 301-302). As the Trial Examiner found, the lack of basis for this testimony is disclosed by the fact that although respondent's pay period ends on a Friday (Clark was offered the job transfer on a Saturday, the first day of a new pay period), Collins testified on a *Thursday* and yet he stated that he was going to inform two men *that day* that they were to receive increases (R. 14; 175, 302, 306). Furthermore, if the decision to transfer Clark to the trainee position had been reached between Collins and Curry on December 15, as Collins testified, there would have been no reason for Collins to write Curry the detailed interoffice memorandum later, the day after Clark received his final pay check, in which Collins asked permission to pay Clark for his final day's work at the trainee's rate instead of the fly boy's rate (R. 272-273, 304-305, 321).

[9] It is well settled that such interrogation has a "natural tendency to instill in the minds of employees fear of discrimination on the basis of the information the employer has obtained," and therefore is violative of Section 8(a)(1) of the Act. *N.L.R.B.* v. *West Coast Casket Co.*, 205 F. 2d 902, 904 (C.A. 9); *N.L.R.B.* v. *Radcliffe*, 211 F. 2d 309, 314 (C.A. 9), certiorari denied, 348 U.S. 833.

accepting the transfer to another position, Collins introduced the subject of the Union by stating "We're not big enough to be union. Maybe some day, but not right now" (R. 49-50, 301).[10]

Before the Board, respondent contended that even if it had been motivated by a desire to delay organization of its employees in offering Clark the trainee position, its conduct did not violate Section 8(a)(3) of the Act because the trainee position was a better job than the fly boy job, and therefore the offer was not discriminatory and did not tend to discourage union membership. The Trial Examiner similarly believed that the complaint should be dismissed because the job offered Clark was better than the one he held.[10a] This line of reasoning is without merit, however, for the term "discriminate" does not necessarily comprehend

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[10] Plainly without substance is respondent's assertion that it discharged Clark when it did in order to vacate the fly boy position for someone whom it eventually intended to hire as a district manager trainee. No such trainee had been hired at the time of the hearing, more than three months after Clark was discharged, nor had a new fly boy been hired at the time of Clark's discharge (R. 309-310). Respondent thus leaves unexplained the haste with which the action was effected. Moreover, the record fails to establish the relation between the functions of the fly boy, which respondent asserts is essential to the trainee's learning process, and the work performed by the district managers. In fact, Collins admitted that a district manager would not be hindered by a lack of knowledge of the fly boy's job (R. 311). It is apparent, therefore, that there was no need to vacate the fly boy position at all.

[10a] There is no question of course that an offer of a better job to an employee as an inducement to abandon union activity violates Section 8(a)(1) of the Act. *Carpenteria Lemon Assn.* v. *N.L.R.B.*, 240 F. 2d 554, 558 (C.A. 9), certiorari denied, 354 U.S. 909; *Sunshine Biscuits, Inc.* v. *N.L.R.B.*, 274 F. 2d 738, 740 (C.A. 7).

a change in the employment relationship which is detrimental to the employee affected. By standard definition the word merely means "to serve to distinguish; to mark as different; to differentiate." *Webster's New International Dictionary,* Second Edition (1959). Accordingly, if as respondent concedes *arguendo,* its disparate treatment of Clark was for an antiunion purpose, the discrimination contemplated by the Act was effected. This conclusion is in accord with settled law which recognizes that the protection of the Act extends "to all elements of the employment relationship which in fact customarily attend employment * * *" (*N.L.R.B.* v. *Waterman Steamship Corp.,* 309 U.S. 206, 218) without regard to whether the change is detrimental to the employee. Thus, a change in the seniority status of an employee, when occasioned by his participation in a lawful strike, violates Section 8(a)(3) (*Olin Mathieson Chemical Corp.* v. *N.L.R.B.,* 232 F. 2d 158 (C.A. 4), affirmed, 352 U.S. 1020), even though such a change merely has a potential detrimental effect on the employee's job tenure or earnings. A transfer from one job to another based on considerations of union membership similarly violates the statute without regard to, or proof of, the nature of the new position. *N.L.R.B.* v. *Star Publishing Co.,* 97 F. 2d 465 (C.A. 9); *N.L.R.B.* v. *Gluek Brewing Co.,* 144 F. 2d 847 (C.A. 8); *South Atlantic Steamship Co.* v. *N.L.R.B.,* 116 F. 2d 480 (C.A. 5); *Combined Century Theatres, Inc.,* 123 NLRB 1759, 1762, enforced in pertinent part, 278 F. 2d 306 (C.A. 2). And see, *N.L.R.B.* v. *Fairmont Creamery Co.,* 143 F. 2d 668, 671 (C.A. 10); *Allis-Chalmers Mfg. Co.* v. *N.L.R.B.,* 162 F. 2d

435, 440 (C.A. 7); *Continental Oil Co.* v. *N.L.R.B.*, 113 F. 2d 473, 484 (C.A. 10). In sum, the fact that respondent took steps to transfer Clark to another job as a consequence, as we have seen, of his union membership, establishes the propriety of the Board's conclusion that respondent thereby violated Section 8(a)(3) and (1).

But respondent did not stop with merely offering Clark the transfer to another job. It gave him the alternative of accepting the transfer or being discharged. When Clark refused the transfer, his discharge promptly followed, and respondent had accomplished its purpose of impeding unionization of its mailroom. Respondent, at the hearing, candidly admitted the discriminatory character of the choice offered Clark when it stated, there was "no question here but what he couldn't keep the fly boy job and he knew it" (R. 95). This admission belies respondent's claim that Clark was not discharged but that he resigned voluntarily, for obviously an employer may not give an employee a choice between being discriminated against and resigning, and when the employee chooses the latter, plead immunity from the processes of the Act. It is manifest that discouragement of union membership was "a natural and foreseeable consequence" (*Radio Officers' Union* v. *N.L.R.B.*, 347 U.S. 17, 52) of the method resorted to by respondent to rid itself of the threat of unionization.[11]

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[11] See also *Republic Aviation Corp.* v. *N.L.R.B.*, 324 U.S. 793, 798, 800; and cf. *N.L.R.B.* v. *G. W. Thomas Drayage & Rigging Co.*, 206 F. 2d 857, 860 (C.A. 9); *N.L.R.B.* v. *J. G. Boswell Co.*, 136 F. 2d 585, 595-596 (C.A. 9); *N.L.R.B.* v. *National Motor Bearing Co.*, 105 F. 2d 652, 658-659 (C.A. 9).

The Trial Examiner found that Collins' action in offering Clark a better job and taking him out of the mailroom was bottomed on the mistaken belief that such action would remove Clark from the Union's jurisdiction and thus delay organization of the mailroom.[12] Accordingly, the Examiner, on the basis of his finding that Collins' belief was mistaken, recommended dismissal of the complaint. The Board disagreed with the Examiner's conclusion, holding, in effect, that even if Clark had been able as a trainee to maintain his membership in the Union and even if the Union under those circumstances would have continued to represent him, such considerations did not absolve respondent from liability for its unlawful action. The Board's decision in this respect is in accord with the established principle that an employer may not defend conduct otherwise unlawful under the Act on the ground that he was mistaken as to the ultimate effect of such conduct. *N.L.R.B.* v. *Link-Belt Co.*, 311 U.S. 584, 589-590; *N.L.R.B.* v. *J. G. Boswell Co.*, 136 F. 2d 585-595 (C.A. 9; *N.L.R.B.* v. *Piezo Mfg. Co.*, 290 F. 2d 455, 456 (C.A. 2); *N.L.R.B.* v. *Ridge Tool Co.*, 211 F. 2d 88 (C.A. 6), enforcing, 102 NLRB 512, 513.

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[12] It is doubtful if Collins' belief was in fact mistaken, for the Union's constitution specifically confines the organization's jurisdiction to employees working inside a newspaper plant, thereby excluding those, such as respondent's district managers, who work away from the premises (R. 175, 319-320, and see *supra* p. 4, n. 5). The Trial Examiner's reference (R. 15) to *American Publishing Corp.* 121 NLRB 115 is inapposite because it involved a different local union operating under a different constitution, in another part of the country, and in an industry other than newspaper publishing.

CONCLUSION

For the foregoing reasons it is respectfully submitted that a decree should issue enforcing the Board's order in full.[13]

STUART ROTHMAN,
General Counsel.

DOMINICK L. MANOLI,
Associate General Counsel,

MARCEL MALLET-PREVOST
Assistant General Counsel,

ALLISON W. BROWN, JR.,
JUDITH BLEICH KAHN,
Attorneys,
National Labor Relations Board.

AUGUST 1961.

[13] Although the complaint alleged the Act to be violated only by virtue of the discharge of Clark, whereas the Board found the offer of the job transfer also to be discriminatory, respondent cannot show that it was prejudiced as a result of this variance. It is not necessary for a complaint to allege every facet of the unlawful conduct involved in a proceeding where, as here, it is clear from the evidence presented and the record of the hearing that the respondent "understood the issue and was afforded full opportunity to justify [its conduct] as innocent rather than discriminatory." *N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 349-350. Accord, *N.L.R.B.* v. *Armato*, 199 F. 2d 800, 804 (C.A. 7); *Eagle-Picher Mining & Smelting Co.* v. *N.L.R.B.*, 119 F. 2d 903, 910 (C.A. 8).

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Unfair Labor Practices

Sec. 8.(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * *

APPENDIX B

References to Exhibits Pursuant to Rule 18 (2) (f) of the Court

(Pages refer to printed record)

General Counsel's exhibits

No.	Identified	Offered	Received In Evidence
1C	35	36	36
1E	35	36	36
3	176–177	177	177
4	304	305	305

Respondent's exhibits [14]

No.	Identified	Offered	Received In Evidence
4	203	204	205
5	51, 236	233–235	236

[14] None of the items printed as respondent's exhibits 1, 2, and 3 were part of the record. Respondent's exhibits 1 and 3 were identified, but never offered in evidence. No item was identified, on the record, as respondent's exhibit 2.

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No. 17310

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

SOUTHERN CALIFORNIA ASSOCIATED NEWSPAPERS, a corporation d/b/a SOUTH BAY DAILY BREEZE,

Respondent.

Brief for Respondent Southern California Associated Newspapers, a Corporation d/b/a South Bay Daily Breeze.

O'MELVENY & MYERS,
CHARLES G. BAKALY, JR.,
433 South Spring Street,
Los Angeles 13, California,
Attorneys for Respondent.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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Brief for Respondent Southern California Associated Newspapers, a Corporation d/b/a South Bay Daily Breeze.

Statement of the Case.

Preliminary Statement.

The Trial Examiner of the National Labor Relations Board issued his Intermediate Report in the above-entitled matter finding that Respondent, Southern California Associated Newspapers, a corporation d/b/a South Bay Daily Breeze, had not engaged in any unfair labor practices in connection with its relations with one of its employees, David Clark, the charging party, and recommending that the complaint be dismissed in its entirety. [R. 8, 19.] The Board issued its Decision and Order concluding that Respondent had violated Sections 8(a)(1) and (3) of the Na-

tional Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U. S. C. Sections 151 *et seq.* (hereinafter referred to as "Act"). In its Decision the Board adopted the evidentiary findings of the Trial Examiner. [R. 20.] The Board did not adopt the Trial Examiner's conclusions or recommendations inconsistent with its decision that Respondent had violated Sections 8(a)(1) and (3) of the Act. [R. 20.]

Respondent controverts the statement of the case submitted by the Board in its brief because it does not fully state the facts as found by the Trial Examiner and adopted by the Board, and because it attempts to change the facts as found by the Trial Examiner and adopted by the Board. For that reason Respondent will, in its statement of facts, present additional facts not referred to in the brief of the Board, which facts were relied upon by the Trial Examiner in recommending that the complaint be dismissed, were adopted by the Board in its Decision, and are hence binding on the Board in the instant case.

Statement of Facts.

Respondent is engaged in the business of publishing and selling newspapers, including a daily newspaper called South Bay Daily Breeze, which is published in Redondo Beach, California, and which is circulated in the beach communities immediately surrounding Redondo Beach.* [R. 8.] David Clark was first

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*Respondent also publishes and sells other newspapers. However, only the business of publishing and selling the South Bay Daily Breeze is involved in the instant case. All references to Respondent shall be deemed to be references only to Respondent's activities in connection with publishing and selling the South Bay Daily Breeze.

associated with Respondent as a newspaper carrier. [R. 9.] Commencing in 1958 and continuing until December 21, 1959 David was an employee assigned to the circulation department. His duties, which consisted of taking the newspapers from the conveyor leading from the press and of preparing mailing wrappers, required him to spend most of his time in the mailroom. [R. 9.] The Respondent did not have a separate mailing department. The mailroom was under the supervision of Howard Collins, the circulation manager. [R. 9.] The jobs of stacking and tying the papers, of addressing wrappers and of carrying and loading the papers were performed in the mailroom by seven employees of the circulation department who were classified as district managers. [R. 66-67; 232-233; 236-237.] These were the only full time mailroom employees.* [R. 17; 236-237; Respondent's Ex. 5, R. 331.] In newspapers where the mailroom employees are represented by Mailers' Union Local 9, International Typographical Union,** this work is performed by members of the Union. [R. 10.] In addition to their mailroom duties, the district managers also were in charge of the newspaper carriers. [R. 10.] Prior to December 19, 1959 David's rate of pay was $1.50 per hour and he was required to work long hours on Saturdays. [R. 9.]

While David was a newspaper carrier, Howard Collins, Respondent's circulation manager, became interested in him and was instrumental in obtaining David a

*David was classified as a part time employee but worked approximately 40 hours per week. [R. 68.]

**The Union involved in the instant case is Mailer's Union Local 9, International Typographical Union AFL-CIO, hereinafter referred to as "Union."

job as a fly boy. [R. 9.] David and Collins were good friends, as well as Collins and David's father, Bernard Clark. [R. 9.] A topic of frequent conversation among all three was the best way in which David could enhance his prospects for a career by attending school. [R. 9.] On many occasions, at Bernard Clark's request, Collins urged David to complete his education. [R. 9.]

Bernard Clark was dissatisfied with David's rate of pay and with the long hours that he worked on Saturdays and felt that David should work less hours and have more money for each hour worked. [R. 10.] Bernard Clark discussed this with Collins on many occasions. [R. 142-143.] Bernard Clark was aware of the fact that Union mailers in downtown Los Angeles were earning in excess of $3.00 per hour [R. 10.] On or about November 1, 1959 Bernard Clark, who was a member of a printer's local of the International Typographical Union, approached an official of the Union. As a result of this an organizer for the Union came to Clark's residence on December 15, 1959 and initiated David into the Union as a journeyman. [R. 10.] The organizer told David that if he was terminated by the Company through no fault of his own the Union would get him another part time job in downtown Los Angeles where Union mailers were receiving in excess of $3.00 per hour. [R. 11.]

On or about December 15, 1959 Collins obtained authorization from Mr. Curry, the publisher, to institute a trainee program for the circulation department. The institution of a trainee program had been considered for some time in order that there would be avail-

able an extra employee who was familiar with all of the duties of the circulation department employees and who would be able to either permanently or temporarily fill in when one of them quit or was unavailable. It was decided that the first step in the trainee program would be the job of fly boy and the second step would be the position of trainee district manager. It was decided that David should be the trainee district manager because he knew the fly boy job and the mailroom procedures and because it was the kind of position which he had been trying to obtain.

On December 19, 1959 Collins offered David the position as a trainee district manager which would pay him $1.67 an hour and which would permit him to work less hours on Saturdays. [R. 12.] As a trainee he would be required to learn to perform all of the duties of the district managers, both inside and outside of the mailroom, including stacking, tying, addressing wrappers, carrying and loading papers and supervising newspaper carriers. This raise in pay and shorter hours had been an objective of the Clarks for several months. [R. 12.] The trainee position offered to David was a better position than the fly boy job with increased pay and it was the type of position David and his father had been trying to obtain for David with Respondent. [R. 15.] During this conversation David stated that he didn't know whether or not he could take the position and that he wanted to talk to his father about it. [R. 43-44.] Collins stated that because of the fact that he wanted to start the trainee program and build a series of trainees and because of the fact that the first step in the program was the job of fly boy, if David didn't

take the position as trainee he would have to hire another trainee in his place and start the new man in the fly boy job. [R. 44.] Collins stated that he hoped that David would take the job. [R. 284.]

On December 21, 1959 Collins again asked him to take the trainee position and David stated that he would not, whereupon David left Respondent's employ. [R. 85.] Both David and Bernard Clark testified that David told Collins on December 19 and 21 that David could not take the new job because the new job would increase his expenses for car insurance and gasoline. [R. 12.] The Trial Examiner did not credit such testimony. He found as a fact that David told Collins that David would not take the new job because he could obtain a job in Los Angeles as a mailer where he could work two shifts a week with many less hours and make more money than he could at the Daily Breeze. [R. 13, 14.] The Trial Examiner further found as a fact that David did not accept the new job which was a better one and for more pay and which was a type of job which David had been trying to obtain with Respondent because of the Union's assurance that if he lost his job through no fault of his own he could get a couple of nights' work a week at double the hourly rate he was getting from Respondent. [R. 16.] The Trial Examiner further found that the objection with respect to the increased automobile expenses was invented to convince the Union he was being given a worse job because he had joined the Union. [R. 16.] The

Trial Examiner further found that although the position Collins offered David was substantially better and of the type he and his father had been trying to obtain for some months, the prospects of getting two nights' work at double the pay seemed more attractive and "David *declined* the job offered by Collins." [R. 17.] (Emphasis added.)

The Trial Examiner found as facts that in David's new job as a trainee he would still have been performing work within the jurisdiction of the Mailers' Union; that he could have remained a member of the Union, and if the Union so desired it could have attempted to represent him in collective bargaining. [R. 14-15; 18.] These findings were adopted by the Board. These findings were based upon undisputed evidence that David's duties as a trainee would have consisted of stacking, folding, counting of papers, tying by hand, delivering papers to mailers, carriers and agents, and inserting of papers as well as supervising newspaper carriers [R. 64-68; 312], and that the Union was interested in organizing employees who did work appertaining to mailing part of the time, and other work not within another union's jurisdiction the rest of the time. [R. 14-15; 191-192.] These findings were made in spite of the fact that the Union organizer testified that the Union was not interested in organizing Respondent's district managers. The Trial Examiner did not credit the organizer's testimony. [R. 14-15.]

After David left the Company on December 21, 1959, he immediately went to work as a journeyman mailer at approximately double the hourly rate of pay he had earned while working for Respondent. [R. 13.]

Thus, the Trial Examiner made evidentiary findings that Respondent's conduct in the instant case consisted of offering David a new and better position with Respondent which was a type of position which David had been trying to obtain with Respondent, and in which new position he would have still been performing work within the jurisdiction of the Union with the understanding that he could not keep his former job if he did not take the new position. The Trial Examiner further found that David decided not to take the job because he wanted employment elsewhere, which employment the Union had promised him and he therefore left Respondent's employ. These findings were adopted by the Board.

The Trial Examiner also found that Respondent's conduct was motivated by a desire to delay Union organization. [R. 17.] Respondent contends that such finding is not supported by the record considered as a whole. (See Argument, Point IV.) However, regardless of that finding, the Trial Examiner found that Respondent had not engaged in any unfair labor practices because Respondent's conduct was not discriminatory and did not have the effect of encouraging or discouraging membership in a labor organization. The Board, accepting all the factual findings of

the Examiner, nevertheless held that the Act was violated because the Respondent's acts were motivated by a desire to delay union organization, regardless of their effect.

The Questions Involved.

Question No. 1: Did Respondent's conduct violate Sections 8(a)(1) and (3) of the Act where such conduct did not in fact tend to discourage or encourage membership in any labor organization and did not interfere with, restrain or coerce its employees in the exercise of their rights granted in Section 7 of the Act?

Question No. 2: Was Respondent's conduct discriminatory within the meaning of Section 8(a)(3) of the Act where such conduct did not adversely affect any term or condition of employment of Respondent's employees?

Question No. 3: Did Respondent's conduct in questioning one of its employees about his Union membership violate Section 8(a)(1) of the Act, particularly in view of the fact that Respondent was not charged with such conduct in the complaint herein.

Question No. 4: Even if the Respondent's motivation for its conduct is relevant and material, which Respondent contends it is not, does the record considered as a whole support the finding that Respondent's conduct was motivated by an intent to delay Union organization?

ARGUMENT.

I.

Respondent Did Not Violate Sections 8(a)(1) and (3) of the Act Because Its Conduct Did Not Tend to Discourage or Encourage Membership in a Labor Organization and Did Not Interfere With, Restrain or Coerce Its Employees in the Exercise of Their Rights Granted in Section 7 of the Act.

Section 8(a) of the Act states that "It shall be an unfair labor practice for an employer . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . ." In the leading case of *National Labor Relations Board v. Kaiser Aluminum & Chemical Corp.,* 217 F. 2d 366 (9th Cir. 1954), this Court set forth the elements which the General Counsel must prove to establish a violation of Section 8(a)(3) of the Act. At page 368 it stated as follows:

> "Substantial evidence must have been adduced (1) to show the employer knew the employee was engaging in a protected activity, (2) to show that the employee was discharged because he had engaged in protected activity, and (3) *to show the discharge had the effect of encouraging or discouraging membership in a labor organization.*" (Emphasis added.)

In *Intermountain Equipment Co. v. National Labor Relations Board,* 239 F. 2d 480 (9th Cir. 1956), this Court reiterated its rule in the *Kaiser* case and stated at page 483 as follows:

> "It should be noted that under the statute mere discrimination among employees is not an unfair

labor practice; it is only where the discrimination encourages or discourages union membership that an unfair labor practice occurs."

It is clear from cases decided by this Court that in order to establish a violation of Section 8(a)(3), the General Counsel must prove that the conduct in fact tended to discourage or encourage membership in a labor organization. This rule has been followed by other courts. *National Labor Relations Board v. W. L. Rives Company,* 288 F. 2d 511 (5th Cir. 1961); *National Labor Relations Board v. Ford Radio & Mica Corp.,* 258 F. 2d 457, 461 (2nd Cir., 1958); *National Labor Realtions Board v. Adkins Transfer Co.,* 226 F. 2d 324, 327 (6th Cir. 1955); *National Labor Relations Board v. J. I. Case Co.,* 198 F. 2d 919, 923 (8th Cir. 1952).

In *National Labor Relations Board v. Adkins Transfer Co., supra,* the court stated at page 327 as follows:

> "We are of the view that the trial examiner was right and the Board was wrong in its decision and order. Only such discrimination as encourages or discourages membership in a labor organization is proscribed by the Act. Radio Officers' Union of Commercial Telegraphers Union, A.F.L. v. National Labor Relations Board, 347 U. S. 17, 74 S. Ct. 323, 98 L. Ed. 455. *In order to establish an 8(a) (3) violation, there must be evidence that the employer's act encouraged or discouraged union membership.* The section requires that *the discrimination in regard to tenure of employment have both the purpose and effect of discouraging union membership,* and to make out a

> case, it must appear that the employer has, by discrimination, encouraged or discouraged membership in a labor organization." (Emphasis added.)

In *National Labor Relations Board v. J. I. Case Co., supra,* the court stated at page 923 as follows:

> "The test which must be applied to the situation is one which we have only recently emphasized —'There can be no violation of (section 8(a)(3)) unless *the conduct complained of can have the proximate and predictable effect of encouraging or discouraging membership in a labor organization.*' [Citing case] And that proximate and predictable effect, as a basis for a finding of violation, must have at least some evidentiary foundation in probative circumstances or testimony." (Emphasis added.)

The Board has recognized that in order to find a violation of Section 8(a)(3) it must find that the conduct *tends* to discourage membership in a labor organization. This rule was succinctly stated in 23 N. L. R. B. Annual Reports (1958), page 64, as follows:

> "Section 8(a)(3) forbids any discrimination in employment which tends 'to encourage or discourage membership in any labor organization.'"

These decisions of the courts are consistent with the intent of Congress. In the House Report on Section 8(a)(3) it is stated that this section outlawed discrimination "which tends to 'encourage or discourage membership in any labor organization.'" (H. R. Report No. 1147, 47th Congress, First Session, p. 21.)

Just as to violate Section 8(a)(3) of the Act the conduct must tend to discourage membership in a labor organization, to violate Section 8(a)(1) the conduct must tend to interfere with the exercise of rights under Section 7 of the Act. The rule was stated in *National Labor Relations Board v. Illinois Tool Works,* 153 F. 2d 811, 814 (7th Cir. 1946) as follows:

> "In answer to these contentions it will be enough to say that this court, National Labor Relations Board v. Burry Biscuit Corp., 7 Cir., 123 F. 2d 540, has recognized that the test of interference, restraint and coercion under §8(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed. Western Cartridge Co. v. National Labor Relations Board, 7 Cir., 134 F. 2d 240, and Rapid Roller Co. v. National Labor Relations Board, 7 Cir., 126 F. 2d 452. *The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act.*" (Emphasis added.)

It is true that it is not necessary for the record to contain specific evidence that the conduct tended to discourage membership in a labor organization or tended to interfere with the exercise of rights under Section 7 of the Act. It is sufficient if the Board can infer that such discouragement or encouragement of membership in a labor organization or interference with the exercise of rights under Section 7 of the Act is a natural and foreseeable consequence of the conduct. *Radio Officers' Union v. National Labor Relations Board*, 347 U. S. 17, 52 (1954). However, this Court has held that the Board cannot create such inferences

where there is no substantial evidence upon which the inferences may be based. In *National Labor Relations Board v. Kaiser Aluminum & Chemical Corp.,* 217 F. 2d 366 (9th Cir. 1954), this Court stated at page 368 as follows:

> "Although the Board is entitled to draw reasonable inferences from the evidence, it cannot create inferences where there is no substantial evidence upon which these may be based."

The United States Supreme Court has held that inferences must not be arbitrary but must have ". . . a reasonable relation to the circumstances of life as we know them. . . ." *Tot v. United States,* 319 U. S. 463, 467-468 (1943).

In *National Labor Relations Board v. W. L. Rives Company,* 288 F. 2d 511 (5th Cir. 1961), a case closely analogous to the instant case, the court held that it must determine whether from the facts it could infer that encouragement of membership in a labor organization was a foreseeable consequence of Rives' conduct. In that case the Rives Company was charged with refusing to reinstate alleged unfair labor practice strikers in violation of Section 8(a)(1) and (3) of the Act. The evidence established that Rives took work away from its employees who were members of the Sheet Metal Workers Union and subcontracted such work to an employer who employed members of the Pipe Fitters Union, after being threatened with a boycott of its products at a construction site by members of the Pipe Fitters Union. At the time this was done Rives assured its employees that this subcontracting would not affect anyone's job and pay and that work would not be reduced. Since then Rives' employees received their

regular full pay. Nevertheless, the employees became restive over the subcontracting and went out on strike. When the strike was concluded all strikers were rehired except six, which Rives treated as economic strikers who had been replaced. The Board held them to be unfair labor practice strikers and ordered their reinstatement because Rives' conduct in withdrawing work from its employees constituted an unfair labor practice. The Board contended, as it does before this Court, that discouragement of union membership was a natural and foreseeable consequence of Rives' conduct. The court disregarded this contention and held that there was no proof that the employer's conduct encouraged or discouraged union membership. The court stated at page 516 as follows:

> "But the essence of any objective test and inquiry into what the 'foreseeable consequences' of an act may be is the probable impact in the light of existing conditions. Conduct likely to encourage or discourage union activity in one surrounding might have quite a different consequence in another environment. The test does not seek the law's answer to some hypothetical problem. The answer, as the problem, would thus be academic only. The law takes the parties as it finds them. Against that background is the question then propounded: *in all reasonable likelihood would this specified conduct encourage* [*or discourage*] *union membership?*" (Emphasis added.)

The Board may attempt to distinguish this case on the ground that the Board had found that Rives "was not actuated by a desire to discriminate against its employees or by an antiunion animus." This distinction

is without merit. The court recognized the rule of *Radio Officers' Union v. National Labor Relations Board,* 347 U. S. 17 (1954), that proof of specific intent to discriminate or to discourage or encourage membership in a labor organization was unnecessary, where in fact the act does encourage or discourage such membership. The court realized that the lack of such intent was not an automatic insulation. It is well established that pressure by one union in order to compel an employer against its will to discriminate in favor of that union and against another union does not excuse the employer when the conduct is in fact discriminatory and has the effect of encouraging membership in a labor organization. *National Labor Relations Board v. Star Publishing Co.,* 97 F. 2d 465 (9th Cir. 1938); *National Labor Relations Board v. Gluck Brewing Co.,* 144 F. 2d 847 (8th Cir. 1944). The court, in *Rives,* did not overrule those cases but it recognized the validity of those cases and cited them at page 515 and then distinguished them from the *Rives* case. The *Rives* case is a square holding that in order to find a violation of Sections 8(a)(1) and (3) the conduct must have the effect of discouraging or encouraging membership in a labor organization.

In the instant case the Trial Examiner found that the conduct of Respondent did not in any way inhibit union organization. [R. 19.] The Board stated in its Decision that it disagreed with the Trial Examiner's theory, but did not state from what evidence it inferred that the Respondent's conduct tended to discourage or encourage membership in a labor organization. [R. 21.] In its brief before this Court the Board states at page 11 that "It is manifest that discouragement of union membership was a 'natural and foreseeable consequence'

of the method resorted to by Respondent to rid itself of the threat of unionization." The Board's brief does not explain this statement and does not recite the evidence from which it infers that it is manifest from the facts of this case that discouragement of membership in a labor organization was a natural and foreseeable consequence.

The conduct of Respondent consisted of offering David Clark a better position than he then had, which was a type of position which David had been attempting to obtain with Respondent, and in which new position he would still be performing work which the Trial Commission held was within the jurisdiction of the Union and within any prospective bargaining unit, with the understanding that he could not keep his former job. The Trial Examiner found that this offer of a trainee position did not cause David Clark to leave his employment with Respondent. [R. 16-17.] He found that David declined the offer and consequently left his employment with Respondent, because thereby he would be enabled to obtain a much better job in Los Angeles. [R. 13, 14.] The Board adopted each of these findings. The Board concluded from Respondent's conduct that it discharged David. Such a conclusion would be warranted only if the offer of a trainee position itself caused David, who sought this type of position, to leave his employment with Respondent. An inference that such offer caused David to leave his employment and thus discouraged membership in a labor organization would be directly contrary to the finding of the Trial Examiner. It also would be arbitrary and unreasonable because such an inference would not have a reasonable relation to the circumstances of life. The transfer to

a better position would not cause a person to leave his employment and would not discourage union membership, particularly where the new position was of a type which the person had been trying to obtain. The transfer to another position within the Union's described jurisdiction would not cause a person to leave his employment. It is not a normal circumstance of life for the compulsory transfer from one job to another job within the union's jurisdiction to cause one to leave his employment or for it to discourage membership in a labor organization if the new job is better in every respect than the old job and is a job which the person had been trying to obtain. Respondent's conduct did not constitute a discharge of David and did not discourage membership in a labor organization.

The Board states that by its conduct Respondent "rid itself of the threat of unionization." This is not correct. David would still be employed by Respondent and would still be able to be represented by a union but for his voluntary decision to leave. The Examiner so found; the Board adopted his findings. Collins offered David the new position on December 19, 1959, on December 21, 1959, and again on December 22, 1959. Collins did not want David to leave. In fact, Collins assumed David would take the new position and paid him at the new rate for December 19th and 21st. However, David decided to take advantage of the Union's offer to obtain for him a much better job in Los Angeles, provided he was discharged by Respondent. He convinced the Union (contrary to what he knew and what the Trial Examiner and Board found) that the trainee position was more undesirable than the fly boy job, that he was justified in turning it down,

and that consequently he had been wrongfully discharged. By these methods he was able to obtain this better employment in Los Angeles. If the threat of unionization was removed, it was done so by David and the Union and not by Respondent.

The Board in its brief further states at page 4 that the effect of David's taking the trainee position would have been to remove him from the mailroom group. This statement is not correct. In the trainee position David would still have been working in the mailroom with the other mailroom employees. In fact, the Trial Examiner found and the Board adopted the finding that the trainee position was not outside of the jurisdiction of the Union but was within its jurisdiction.

Respondent did not violate Sections 8(a)(1) and (3) of the Act because its conduct did not tend to discourage or encourage membership in any labor organization or did not interfere with, restrain or coerce its employees in the exercise of their rights granted under Section 7 of the Act.

II.

Respondent Did Not Violate Section 8(a)(3) of the Act Because Its Conduct Was Not Discriminatory.

In order for conduct to be discriminatory within the meaning of Section 8(a)(3) of the Act the conduct must be such as to adversely affect the employees. *National Labor Relations Board v. W. L. Rives Company*, 288 F. 2d 511 (5th Cir. 1961).

In its Decision in the instant case the Board adopted the rule that changes in the terms and conditions of employment based upon the fact or absence of union

membership are discriminatory within the meaning of the Act. In support of this rule the Board cited two of its own recent decisions, *W. L. Rives Company,* 125 N. L. R. B. 772, and *Combined Century Theatres,* 123 N. L. R. B. 1759. [R. 21.]

Orders based upon this rule have not been enforced unless the change in the terms and conditions of employment had an adverse effect upon the employees. The Board's order in the *Rives* case was not enforced by the Court of Appeals for the Fifth Circuit. That court held that Rives' conduct did not have the effect of encouraging or discouraging membership in a labor organization. It also held that the conduct was not discriminatory because it did not adversely affect the employees. The court stated at pages 515-516 as follows:

> "But here there was nothing done or intended which in any way disparaged the employees either singly or as a group. Their pay remained exactly as it had. They were given full work with no reduction either in hours worked or the applicable pay scale. The only difference was that step (2) operations on material destined for Bowater was now performed by the independent contractor Jamison. Rives' men did step (1) work on this and all other jobs exactly as they had in the past. They performed step (2) work on all jobs other than Bowater. When they were not busy with this work, other tasks were found. These were of the kind to which the men were occasionally assigned in the past. None of this work was menial or in any sense degrading, likely to embarrass or humiliate any of the men in the eyes of fellow workers."

The Board's order in the *Century Theatres* case was enforced in part by the Court of Appeals for the Second Circuit, 278 F. 2d 306 (1960). In that case it was proved that one employee was terminated because he was not a member of the union in order to make room for an employee who was a member of the union. That case is clearly distinguishable from the instant case. There was no question but what that conduct had both the effect of encouraging union membership and of adversely affecting the employee. However, the court refused to order reinstatement of the employee because within a few days after his first termination he was re-employed and was later terminated for just cause. The court did enforce the part of the order ordering back pay for the period between the employee's first termination and his second employment.

The Board in its brief at pages 10-11 cites several cases in support of its contention that any change in the terms and conditions of employment based upon the fact or absence of union membership is discriminatory. However, in each of those cases the employees were detrimentally affected in some way by the conduct. In *Olin Matheson Chemical Corp. v. National Labor Relations Board,* 232 F. 2d 158 (4th Cir. 1956), the employer's conduct consisted of reducing seniority status of some employees which, of course, had a potential detrimental effect on such employees. In *National Labor Relations Board v. Star Publishing Co.,* 97 F. 2d 465 (9th Cir. 1938), and in *National Labor Relations Board v. Gluek Brewing Co.,* 144 F. 2d 847 (8th Cir. 1944), the employer transferred employees to temporary jobs with limited duration. It

was clear that the conduct had a detrimental effect on such employees because their job security was impaired. In *National Labor Relations Board v. Star Publishing Co., supra,* the court stated at page 470: "Respondent makes no contention that the transfer of the men in question was not such a discrimination." In *National Labor Relations Board v. Fairmont Creamery Co.,* 143 F. 2d 668 (10th Cir. 1944), and in *Continental Oil Co. v. National Labor Relations Board,* 113 F. 2d 473 (10th Cir. 1940), the employer transferred employees to other jobs which were unquestionably less desirable.

In *National Labor Relations Board v. W. L. Rives Company, supra,* most of the cases now relied upon by the Board were cited to the court. That court distinguished those cases and stated at page 515 as follows:

> "We are of a like view that there is no support for the conclusion that this conduct constituted a 'discrimination in regard to * * * employment * * * to encourage or discourage membership in any labor organization' under §8(a)(3). In the peculiar setting of this case we think the element of discriminatory practice in regard to 'hire or tenure of employment or any term or condition of employment * * *' was lacking. Of course in assaying this, we are mindful that it is something more than a simple question of money wages as such. N. L. R. B. v. Waterman Steamship Corp., 1940, 309 U. S. 206, at page 218, 60 S. Ct. 493, 84 L. Ed. 704. Other things such as seniority, Olin Matheson Chemical Corp. v. N. L. R. B., 4 Cir., 1956, 232 F. 2d 158, or trans-

fers, Continental Oil Co. v. N. L. R. B., 10 Cir., 1940, 113 F. 2d 473, 484, are important, sometime decisively so.[7]"

The Court's footnote was as follows:

"[7]See also N.L.R.B. v. Star Publishing Co., 9 Cir., 1938, 97 F. 2d 465; N.L.R.B. v. Gluek Brewing Co., 8 Cir., 1944, 144 F. 2d 847; South Atlantic SS Co. v. N.L.R.B., 5 Cir., 1941, 116 F. 2d 480, certiorari denied, 313 U.S. 582, 61 S. Ct. 1101, 85 L. Ed. 1538."

The Board in its brief at pages 9-10 contends that the term "discriminate" does not comprehend a change in the employment relationship which is detrimental to the employee affected. It relies upon a dictionary definition of the word "discriminate" to the effect that the word means "to serve to distinguish; to make as different, to differentiate." However, the Act does not state that it is an unfair labor practice "to discriminate". Section 8(a)(3) states that it shall be an unfair labor practice for an employer "by discrimination" in regard to hire or tenure of employment to encourage or discourage membership in a labor organization. By standard definition the word "discrimination" means "a distinction in treatment, esp., an unfair or injurious distinction." *Webster's New International Dictionary,* Second Edition, Unabridged. Thus, far from supporting the Board's rule, the standard definition of the word "discrimination" supports Respondent's contention and the Trial Examiner's theory that in order for an employer to commit an unfair labor practice "by discrimination" the conduct must not only be different but it must also have an injurious or adverse effect.

In the instant case Respondent's offer of the trainee position, a kind of job which David and his father had

been trying to obtain for some time, was not discriminatory because it was a better job at increased pay. [R. 15, 18.] This is not a case where the employee was transferred against his will. David had been trying to get this kind of a position with Respondent. David did not refuse this position because he did not want it; he refused the position because he wanted to obtain a still better one with more pay and less hours which the Union had promised him if he left his job with Respondent through no fault of his own.

The Board in its brief at page 9 states in a footnote that there is no question of course that an offer of a better position to an employee as an inducement to abandon union activity violates Section 8(a)(1) of the Act. If the Board is suggesting that in the instant case Respondent has been charged with such conduct or that such conduct is prohibited by its Order which it seeks to have enforced, it is clearly wrong. The complaint herein does not charge Respondent with offering David a better position as an inducement to abandon his Union activity. In fact, at the hearing before the Trial Examiner and in its briefs, the General Counsel maintained that the trainee position was a worse position than David's old job. Furthermore, the Board's order does not purport to prohibit offering a better position as an inducement to abandon Union activity. The cases cited by the Board to the effect that the offer of a better job as an inducement to abandon union activity violates Section 8(a)(1) of the Act are completely irrelevant and immaterial to a decision of the instant case.

The court in *National Labor Relations Board v. W. L. Rives Company,* 288 F. 2d 511 (5th Cir. 1961),

appropriately stated the law applicable in the instant case when it stated at page 516 as follows:

> "Whatever doubt there might be on this score when 'discrimination' is viewed as a single element, there can be none when viewed, as the statute does, by coupling discrimination with the prohibited effect to 'encourage or discourage membership in any labor organization.' "

It is clear that Respondent's conduct in this case was not violative of Section 8(a)(1) and (3) of the Act because it was not discriminatory and did not tend to encourage or discourage membership in a labor organization.

III.

Respondent Did Not Violate Section 8(a)(1) of the Act by Questioning an Employee About His Union Membership.

It is well settled that the mere questioning of employees without expressly or impliedly threatening or promising benefits is not an unfair labor practice. *National Labor Relations Board v. Fullerton Publishing Company,* 283 F. 2d 545 (9th Cir. 1960); *National Labor Relations Board v. McCatron,* 216 F. 2d 212 (9th Cir. 1954, certiorari denied, 348 U. S. 943, 1955). In *National Labor Relations Board v. McCatron, supra,* this Court stated at page 216 as follows:

> "Interrogation regarding union activity does not in and of itself violate §8(a)(1). This holding may be at variance with that of the Board as expressed in Standard-Coosa-Thatcher Co., 1949, 85 N. L. R. B. 1358. We are of the opinion that in order to violate §8(a)(1) such interrogation must

> either contain an express or implied threat or promise, or form part of an overall pattern whose tendency is to restrain or coerce. We so held in Wayside Press, Inc. v. N. L. R. B., 9 Cir., 1953, 206 F. 2d 862. Other circuits have taken the same view. N. L. R. B. v. Associated Dry Goods Corp., 2 Cir., 1954, 209 F. 2d 593; N. L. R. B. v. Syracuse Color Press, Inc., 2 Cir., 1954, 209 F. 2d 596; N. L. R. B. v. Montgomery Ward & Co., 2 Cir., 1951, 192 F. 2d 160; N. L. R. B. v. Superior Co., 6 Cir., 1952, 199 F. 2d 39, 43; Sax v. N. L. R. B., 7 Cir., 1948, 171 F. 2d 769; N. L. R. B. v. Arthur Winer, Inc., 7 Cir., 1952, 194 F. 2d 370; N. L. R. B. v. England Bros., Inc., 1 Cir., 1953, 201 F. 2d 395."

In the instant case the only questioning was as to whether David had been contacted by the Union or was a member of the Union. This questioning certainly does not contain an actual or implied threat or promise and is, therefore, not violative of Section 8(a)(1).

Moreover, in the instant case, the complaint does not allege that Respondent violated Section 8(a)(1) by the questioning of its employees. Such issue was not tried by the Trial Examiner. He stated at the commencement of his Intermediate Report: "The question presented is whether one David Clark's termination from Respondent's employ was a violation of Section 8(a)(3) of the Act." The first time in the instant case that Respondent knew that the question of employee interrogation as a violation was involved was when the Board issued its Decision and Order requiring it to cease and desist from such interrogation. An order of an administrative agency is invalid where it

is made without giving the opposing party notice that such an order might be made and without giving it the opportunity to oppose such order. The conduct of the agency under such circumstances violates judicial tradition embodying the basic concepts of fair play. *Morgan v. United States,* 304 U. S. 1, 18-22 (1938).

The conduct of the employer in questioning its employee did not violate Section 8(a)(1) of the Act.

IV.

Respondent's Conduct Was Not Motivated by an Intent to Discourage Membership in the Union or to Interfere With, Restrain or Coerce Employees in the Exercise of the Rights Granted Under Section 7 of the Act.

The Trial Examiner held that regardless of the reasons for Respondent's conduct, the conduct did not violate Sections 8(a)(1) and (3) of the Act because it was not discriminatory and did not have the effect of encouraging or discouraging membership in a labor organization. Respondent contends that the reasons for Respondent's conduct are immaterial to a decision of the instant case.

However, the Trial Examiner went on to find that Collins offered David a better position based on the mistaken belief that it might prevent David from being represented by the Union in Respondent's mailroom. Respondent has excepted to that finding and to related findings. Respondent contends that the findings which it has excepted to, and the related findings, while irrelevant and immaterial to a decision of the instant case, are clearly erroneous and not supported by the record considered as a whole.

The Board cannot conclude that Respondent violated Sections 8(a)(1) and (3) of the Act in any event without proving by a preponderance of the evidence that the Respondent's conduct was motivated by an intent to discourage Union membership or other protected activity. The rule was stated by Mr. Justice Reed in *Radio Officers' Union v. National Labor Relations Board,* 347 U. S. 17 (1954) at pages 43-44 as follows:

> "The relevance of the motivation of the employer in such discrimination has been consistently recognized under both §8(a)(3) and its predecessor. In the first case to reach the Court under the National Labor Relations Act, *Labor Board v. Jones & Laughlin Steel Corp.,* 301 U. S. 1, in which we upheld the constitutionality of §8(3), we said with respect to limitations placed upon employers' right to discharge by that section that 'the [employer's] true purpose is the subject of investigation with full opportunity to show the facts.' Id., at 46. In another case the same day we found the employer's 'real motive' to be decisive and stated that 'the Act permits a discharge for any reason other than union activity or agitation for collective bargaining with employees.' Courts of Appeals have uniformly applied this criteria, and writers in the field of labor law emphasize the importance of the employer's motivation to a finding of violation of this section. Moreover, the National Labor Relations Board in its annual reports regularly reiterates this requirement in its discussion of §8(a)(3). For example, a recent report states that 'upon scrutiny of all the facts in a particular case, the Board must de-

termine whether or not the employer's treatment of the employee was motivated by a desire to encourage or discourage union membership or other activities protected by the statute.' "

The conduct of the Respondent in offering the trainee position to David Clark and in advising him that he could not keep his fly boy job if he refused the trainee position was motivated by the need to establish the trainee program and by economic considerations and not by a desire to discourage membership in the Union or to interfere with its employees' rights under Section 7. The undisputed evidence established the following facts which Respondent contends prove that Respondent was not motivated by a desire to discourage union membership: During the fall of 1959 the operation of the circulation department was made difficult by reason of the constant turnover of district managers. [R. 69, 265.] Trained employees were required to neglect the proper performance of their duties in the circulation department in order to do the work of employees who had quit. [R. 266, 267.] During this period it occurred to Collins that a possible solution would be to have an extra man available who would know all of the inside and outside duties of all district managers so that he could fill in when a regular district manager quit or was unavailable. This extra man could either be a permanent replacement or a temporary replacement until a new man could be trained. [R. 272, 273, 299, 300.]

However, Collins hesitated to request approval of his idea because of the fact that it involved hiring an extra man. [R. 272.] In December, 1959, Collins had great difficulty in replacing one of his district man-

agers. [R. 275.] This event emphasized the need for the extra man who would know the outside and inside duties of all district managers. [R. 275.] Several other departments of the Company had extra men who were classified as trainees and Collins had previously considered requesting such a trainee program. [R. 272.] If a trainee program were established in the circulation department he would be able to have available an extra employee who was familiar with all of the duties of the circulation department employees and who was able to either permanently or temporarily fill in when a district manager quit or was unavailable. Collins and Mr. Curry had previously discussed such a possibility.

On or about December 15, 1959 Collins approached Mr. Curry and requested and obtained approval to hire an extra man as a trainee in the circulation department. [R. 272, 275-276.] It was decided that the pay would be $1.67 per hour. [R. 277, 302.] It was decided that the first step in the program would be the fly boy job because the inside duties of the district managers were so closely related to the duties of the fly boy that to first know the duties of the fly boy would be of assistance in learning the inside duties of a district manager and the mailroom procedures, and because on occasion it was necessary for a district manager to actually relieve the fly boy and perform his work. [R. 273.] All of the district managers knew and could perform the duties of the fly boy job. [R. 273.] It was decided that David Clark should be the trainee district manager, the second step in the program because he knew the fly boy job and the inside duties of the district managers and therefore could immediately commence learning their outside

duties and performing their inside duties; because he had been a good employee and deserved the promotion; because he wanted a job with shorter hours; and because he would gain experience in dealing with people which would help him in the future. [R. 278-279.]

Collins assumed that David would take the new position because of his prior conversations with him, because he had assisted the district managers in their outside duties, and because it was a promotion. [R. 302.] It was decided to make the new position effective December 19, the beginning of the next pay period. [R. 302.] Collins normally did not advise his employees that they are getting a raise or are being promoted until the day on which the raise was effective. [R. 302.] In this case the raise was effective on December 19, 1959, and that was the day on which Collins advised David that he wanted him to take the trainee position.

On December 19, 1959 Collins offered David the trainee position. [R. 74-75, 279-280.] Collins advised David that because of the fact that he wanted to start the trainee program and build a series of trainees, and because of the fact that the first step in the program was the job of fly boy, if David didn't take the new position as trainee he would have to hire another trainee and start him in the fly boy job. [R. 43-44.] David and his father stated that he could not take it. [R. 114-115, 126-129, 139-140, 283.] On December 21, 1959 David was again asked to take the position and David stated he *would not* take the position; whereupon David left his employment with Respondent. [R. 85.]

On December 22, 1959, when David returned to pick up his check, he was asked if he had changed his mind and David replied "No." [R. 49.] David was very happy and friendly [R. 99], and when asked at the hearing the following question: "You weren't mad at Mr. Collins?", answered "Oh, no. What was there to be mad about." [R. 99.] Shortly after December 21, 1959 a new trainee was employed under the same terms and conditions as had been offered to David. [R. 291.] At the time of the hearing he was still learning the fly boy job and the inside duties of the district managers, but had gone out with some of the district managers on various occasions. [R. 306, 309.] Collins contemplated that in the near future the present fly boy would move up to the next step in the trainee program, which was the position offered to David, and that Collins would then employ a new trainee to commence as fly boy. [R. 312.] The actions of Respondent were motivated by the needs of the operation and by economic considerations and not by a desire to discourage membership in the Union or to interfere with the employees' rights.

Moreover, there was no evidence that the trainee position was one outside of the jurisdiction of the Union. In the new job David would continue performing duties in the mailroom as well as duties elsewhere. In fact, the Trial Examiner found that the trainee position was not outside of the jurisdiction of the Union but was within its jurisdiction. It is essential to a finding of illegal motivation in the instant case that it be proved by a preponderance of the evidence that the new position was outside of the Union's jurisdiction. The Trial Examiner recognized the necessity of such a find-

ing. This is illustrated by the following statements of the Trial Examiner during the course of the hearing just before the close of the General Counsel's case:

> "Implicit in this record, probably, is the question of union jurisdiction.
>
> "Mr. Clark here, has been a member of the ITU for a long time, and unless you are going to develop it, I was going to find out whether he knew what the practice in this area is with respect to what type of work the mailers' division of the ITU includes.
>
> "Mr. Mark: No. That particular point I wasn't going to go into.
>
> "Trial Examiner: I beg your pardon.
>
> "Mr. Mark: I hadn't planned on going into that point or to call witnesses on it.
>
> "Trial Examiner: Well, I regard it as essential in making—even to make a prima facie case to ascertain that, the aspect of it; otherwise I don't see how there is any basis for—on the evidence that I have heard so far for finding discriminatory motivation." [R. 146-147.]

However, despite his recognition of the necessity of proving that the trainee position was not one within the jurisdiction of the Union in order to find discriminatory motivation, the Trial Examiner found that Respondent was motivated by an intent to delay Union organization while at the same time finding that the trainee position was one within the jurisdiction of the Union. The finding of such motivation was erroneous and not supported by the record considered as a whole.

The Board relies upon the following factors in support of its finding that the Respondent was moti-

vated by an intent to delay union organization: (1) the "abrupt move" to take David out of the mailroom when there was no one else available to perform the work; (2) the fact that David was not permitted to continue his fly boy job; (3) the fact that Respondent was required temporarily to assign Clark's work to other employees for more than a month; and (4) statements of Collins to the effect that there was no need for a Union and that Respondent's mailroom was not ready for a Union.

The offering to David of the trainee position was not an "abrupt move" to take him out of the mailroom. The creation of a position similar to the trainee position had been discussed by Collins with David and other employees for some time. The reason that it was not put into effect sooner was because it would require the employing of an extra man. However, when they had so much difficulty in hiring someone on December 15th to replace a district manager, Collins felt that that difficulty was sufficient to enable him to convince the publisher that it would be better for the operation of the paper if another man was employed who would be able to take up the slack when a district manager departed and therefore eliminate some of the confusion surrounding such an event. Furthermore, the trainee position would not have taken David out of the mailroom. He would still have performed duties in the mailroom, such as stacking and tying papers, carrying papers to the dock and loading trucks.

The fact that David was not permitted to continue his fly boy job was adequately explained by Collins. Collins wanted to commence a trainee program. He had persuaded Mr. Curry to start such a program. The

first step in the trainee program was the fly boy job. After an employee knew the fly boy job he would be promoted to the second step in the program, which was the position offered to David. David knew the fly boy job and was thus ready for the trainee position. However, if David did not take the position Collins would have had to employ someone directly to that position without that employee becoming familiar with the mailroom procedures as a fly boy. This Collins did not want to do because he believed that in order to be a successful trainee an employee must first learn the fly boy job and mailroom procedures. Therefore, if David could not take the position Collins had to hire someone in David's fly boy job in order to start the trainee program properly.

There is no evidence to support the Board's finding that Respondent temporarily assigned Clark's work to other employees for over a month. The record is clear that a newspaper carrier by the name of John Rinde was employed in the fly boy position as a trainee at the rate of $1.67 per hour soon after David left. [R. 291.] Collins had already spoken to him about promoting him to this job prior to December 21, 1959. [R. 291.] As soon as Rinde sufficiently learned the duties of fly boy, which was the first step in the trainee program, another trainee was to be hired in his position and Rinde would be promoted to the position which David refused. Moreover, it is clear from the record that David left on December 21 because he wanted to go to work in Los Angeles. In fact he worked in Los Angeles the night of December 21, 1959. It is true that he asked Collins whether Collins wanted him to remain and Collins said that it was not necessary. How-

ever, this was consistent with the desire on the part of Collins to let David, who wanted to depart anyway, depart as soon as possible. There was no animosity between David and Collins; in fact David testified that there was no reason for him to be mad at Collins.

The Board relied upon statements of Collins to the effect that it was his opinion that there was no need for a Union and that the mailroom was not ready for a Union. These are merely statements of opinion. Mere statements of opinion cannot be the sole basis for the finding of an unfair labor practice. In *Press Co. v. National Labor Relations Board,* 118 F. 2d 937 (D. C. Cir. 1940), the court stated at page 942 as follows:

> "One or two other witnesses said the general impression of those on the paper was that Lewis was out of sympathy with the Guild, and this doubtless was true. But giving due weight to the normal and natural effect of his statements, we are nevertheless of opinion that, without more, the Board was not justified in finding that *alone* (emphasis supplied) they constituted an unfair labor practice. *The labor law does not prohibit the right of opinion on the part of the employer, nor the expression of it.* (Citing cases.)" (Emphasis added.)

The burden is on the Board to establish by a preponderance of the evidence that Respondent was motivated by an intent to delay Union organization. This burden is not met merely by introducing evidence which shows no more than a suspicion that Respondent was

so motivated. In the instant case the record considered as a whole does not support a finding that Respondent's conduct was motivated by an intent to delay Union organization.

Conclusion.

For the reasons stated above it is submitted that the Board has not proved by a preponderance of the evidence that the Respondent has violated Section 8(a)(1) or 8(a)(3) of the Act and that its petition for enforcement of its order be denied.

Dated: October 12, 1961.

Respectfully submitted,

O'Melveny & Myers,
Charles G. Bakaly, Jr.,
Attorneys for Respondent.

No. 17310

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SOUTHERN CALIFORNIA ASSOCIATED NEWSPAPERS, A CORPORATION D/B/A SOUTH BAY DAILY BREEZE, RESPONDENT

On Petition for Enforcement of An Order of the National Labor Relations Board

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STUART ROTHMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

ALLISON W. BROWN, JR.,
JUDITH BLEICH KAHN,
Attorneys,
National Labor Relations Board.

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REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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1. Respondent disputes the validity of the Board finding that Collins' questioning of Clark about his union membership violated Section 8(a)(1) of the Act, first, by suggesting that the interrogation did not contain an actual or implied threat or promise and that therefore it was privileged (Br. 25-27).

As pointed out in the Board's opening brief (p. 8), however, this Court has recognized that interrogation such as that engaged in by Collins is unlawful because it has a "natural tendency to instill in the minds of

employees fear of discrimination on the basis of the information the employer has obtained." *N.L.R.B.* v. *West Coast Casket Co.*, 205 F. 2d 902, 904 (C.A. 9). Moreover, where, as here, the interrogation is shown as part of a course of employer conduct designed to defeat the unionization of employees, its illegality is established despite the absence of accompanying threats or promises. *N.L.R.B.* v. *Radcliffe*, 211 F. 2d 309, 314 (C.A. 9), certiorari denied, 348 U.S. 833; *N.L.R.B.* v. *State Center Warehouse & Cold Storage Co.*, 193 F. 2d 156 (C.A. 9).

In the instant case it is manifest that Collins' interrogation of Clark was no mere "innocuous inquiry" (*N.L.R.B.* v. *Hill and Hill Truck Line*, 266 F. 2d 883, 886 (C.A. 5)) but rather, in light of the unlawful treatment to which Clark was subjected immediately thereafter, that the questioning was designed to elicit "information most useful for discrimination". *N.L.R.B.* v. *Firedoor Corporation of America*, 291 F. 2d 328, 331 (C.A. 2). In such circumstances, the interrogation is unlawful because "it is a part of the means by which the employer's hostility carries with it the purpose to retaliate against Union sympathizers * * *." *N.L.R.B.* v. *McGahey*, 233 F. 2d 406, 410 (C.A. 5). See *N.L.R.B.* v. *Chautauqua Hardware Corp.*, 192 F. 2d 492, 494 (C.A. 2); *Stokely Foods Inc.* v. *N.L.R.B.*, 193 F. 2d 736, 738-739 (C.A. 5); *N.L.R.B.* v. *Cen-Tennial Cotton Gin Co.*, 193 F. 2d 502, 503-504 (C.A. 5); *N.L.R.B.* v. *Brown Paper Mill Co.*, 133 F. 2d 988, 989 (C.A. 5); and cf. *N.L.R.B.* v. *Fullerton Publishing Co.*, 283 F. 2d 545, 551 (C.A. 9).

2. Respondent also attacks the Board's finding that Section 8(a)(1) was violated as the result of Collins' interrogation of Clark, on the ground that the complaint did not allege this to be a separate violation of the Act (Br. 26-27). It is apparent, however, that respondent misconceives the function of the complaint in a Board proceeding, for "the Act does not require common law formality in pleading." *N.L.R.B.* v. *Lund*, 103 F. 2d 815, 820 (C.A. 8). Thus under settled law, a complaint in an unfair labor practice proceeding may be amended at any time during a hearing. Section 10(b); *Consolidated Edison Co.* v. *N.L.R.B.*, 305 U.S. 197, 224-225; *N.L.R.B.* v. *Dinion Coil Co.*, 201 F. 2d 484, 491 (C.A. 2). But prejudice does not necessarily follow from failure to formally amend the complaint to specify every facet of the conduct under consideration where, as here, it is clear from the evidence presented and the record of the hearing that the respondent "understood the issue and was afforded full opportunity to justify [its conduct] as innocent rather than discriminatory." *N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 349-350. Accord, *N.L.R.B.* v. *Armato*, 199 F. 2d 800, 804 (C.A. 7); *Eagle-Picher Mining & Smelting Co.* v. *N.L.R.B.*, 119 F. 2d 903, 910 (C.A. 8); *Fort Wayne Corrugated Paper Co.* v. *N.L.R.B.*, 111 F. 2d 869, 873 (C.A. 7). Under such circumstances, the Board may *sua sponte* make conformity between the pleadings and the proof implicit in its findings. *N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, *supra*, 304 U.S. at 349-350; *N.L.R.B.* v. *Midwest Transfer Co.*, 287 F. 2d 443, 445-446 (C.A. 3); *N.L.R.B.* v. *Somerset Classics*, 193 F. 2d

613, 615 (C.A. 2), certiorari denied, 344 U.S. 816; cf. *American Newspaper Publishers Ass'n* v. *N.L.R.B.*, 193 F. 2d 782, 798 (C.A. 7), certiorari denied, 344 U.S. 816. This procedure is comparable to Rule 15 (b) of the Federal Rules of Civil Procedure which permits amendment of pleadings to conform to the evidence (see *N.L.R.B.* v. *Roure-Dupont Mfg. Co.*, 199 F. 2d 631, 633 (C.A. 2)), and also states:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.

Respondent understood at the hearing that Collins' interrogation of Clark was in issue. Clark testified concerning the incident on direct examination (R. 40-41), and respondent had an opportunity through cross-examination and through the introduction of its own evidence to counter the effect of that testimony. Respondent did not follow that course, however. Rather, Collins testifying as respondent's witness, admitted on direct examination that he had engaged in the interrogation of Clark (R. 261). Respondent thus was aware that Collins' interrogation would be considered at least as a factor, in determining the motivation behind the discharge of Clark, an action which the complaint expressly alleged to be violative of the Act (R. 4). Further, it is recognized that where the Board's jurisdiction is invoked by a complaint alleging one unfair labor practice, "any unfair labor practices

growing out of and related to this form of violation come within the Board's authority." *N.L.R.B.* v. *Somerset Classics, Inc.*, *supra*, 193 F. 2d at 615; *Stewart Die Casting Corp.* v. *N.L.R.B.*, 114 F. 2d 849, 856-857 (C.A. 7), certiorari denied, 312 U.S. 680; see also *N.L.R.B.* v. *Fant Milling Co.*, 360 U.S. 301, 306-309; *N.L.R.B.* v. *Pallette Stone Corp.*, 283 F. 2d 641, 642 (C.A. 2). Accordingly, respondent was sufficiently informed that the interrogation was under consideration not only as an element of proof in connection with Clark's discharge, but in addition, as the basis for a possible finding of a separate violation of the Act. See *Republic Steel Corp.* v. *N.L.R.B.*, 107 F. 2d 472, 478-479 (C.A. 3), modified on other grounds, 311 U.S. 7; *N.L.R.B.* v. *Midwest Transfer Co.*, *supra*, 287 F. 2d at 445-446.[1]

If respondent had believed that the Board improperly found this interrogation to be violative of Section 8(a)(1) of the Act, respondent could have moved for reconsideration or modification of the Board's order. Under Section 102.49 of the Board's Rules and Regulations (29 C.F.R. 193, 1961 Cum. Pocket Supp.) and Section 10(d) of the Act, the Board could have reconsidered its decision and order at any time during the approximately two-and-a-half months between its

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[1] As a rule, where specific facts are set out in a pleading, it is not necessary to state the legal conclusion to be drawn from such facts. 71 *Corpus Juris Secundum*, Pleading § 15; *Walker* v. *Calloway*, 99 Cal. App. 2d 675, 681, 222 P. 2d 445, 459; *Notten* v. *Mensing*, 3 Cal. 2d 469, 477, 45 P. 2d 198, 202.

issuance on February 9, 1961, and the filing of the record in Court in connection with this litigation, on April 26, 1961.[2] On such a motion for reconsideration, respondent could have urged that Collins' interrogation was not violative of the Act. By its failure to pursue such a course of action, respondent is foreclosed at this stage from claiming prejudice as a result of the Board's finding. Cf. *Utica-Observer Dispatch* v. *N.L.R.B.*, 229 F. 2d 575, 577-578 (C.A. 2); 3 *Davis, Administrative Law Treatise* 104.

3. With respect to the Board's conclusion that respondent's treatment of employee Clark violated Section 8(a)(3) and (1) of the Act, respondent argues that even if it had a discriminatory intent in offering Clark the new position as a condition of continued employment, its conduct was not unlawful because the offer had no adverse effect on the employment conditions of its employees and therefore did not

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[2] Section 102.49 of the Board's Rules and Regulations reads in relevant part:

> *Modification or setting aside of order of Board before record filed in court; action thereafter.*—Within the limitations of the provisions of section 10(c) of the act, and section 102.48 of these rules, until a transcript of the record in a case shall have been filed in a court, within the meaning of section 10 of the act, the Board may at any time upon reasonable notice modify or set aside, in whole or in part, any findings of fact, conclusions of law, or order made or issued by it.

Section 10(d) of the Act provides as follows:

> Until the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

tend to discourage union membership (Br. 10-25).[3]

In making this argument respondent relies heavily on *N.L.R.B.* v. *W. L. Rives Co.*, 288 F. 2d 511 (C.A. 5) (Br. 14-16, 19-20, 22, 24-25). The *Rives* case, however, involved an employer, described by the court (288 F. 2d at 512) as "caught 'between the devil and the deep blue'." For that case arose from a jurisdictional dispute between two unions, and the employer, in an attempt to reach a *modus vivendi*, subcontracted certain work in order to obtain for its product the label of a union other than the certified bargaining representative. The court noted that the employer had no hostility to either of the unions "or to trade unionism generally" (288 F. 2d at 513), and held that because there was no intent to dis-

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[3] There is nothing in the Board's findings to sustain respondent's assumption that the job offer to Clark did not have an adverse effect on employees in respondent's plant. Thus, the fact that Clark did not want the job that was offered him is evidenced by his selecting dismissal over acceptance of it. Respondent errs in its assertion that the Trial Examiner found that the offer of the new position did not cause Clark to leave respondent's employ (Br. 17). Rather, the Examiner's finding was that Clark did not accept the position because he had the union representative's assurance that if he lost his job through no fault of his own, he could get other employment (R. 16). Hence, not only was Clark adversely affected as the result of respondent's action, but other employees were thereby warned that union considerations might well be the basis for respondent's effecting unwanted changes in their working conditions. "Moreover, the Act does not require that the employees discriminated against be the ones encouraged [or discouraged] for purposes of violations of § 8(a)(3)" *Radio Officers' Union* v. *N.L.R.B.*, 347 U.S. 17, 51; accord: *N.L.R.B.* v. *Richards*, 265 F. 2d 855, 861 (C.A. 3); and see *Wells, Inc.* v. *N.L.R.B.*, 162 F. 2d 457 (C.A. 9).

courage or encourage union membership, the employer's action did not violate Section 8(a)(3) and (1) of the Act. The court examined the effect of the discrimination in that case, presumably, only because had there been an effect, the employer's unlawful intent could then have been presumed in accordance with *Radio Officers' Union* v. *N.L.R.B.*, 347 U.S. 17, 44-45. Hence, if the employer in *Rives* had had the intent to discourage union activity which, as we have shown in our opening brief (pp. 6-9), respondent had herein, the employer's conduct would have been held unlawful. Cf. *Pittsburgh-Des Moines Steel Co.* v. *N.L.R.B.*, 284 F. 2d 74, 81-83 (C.A. 9).

As we have previously indicated, once it is shown that a change in an employee's employment relationship was effected for the proscribed purpose of discouraging union activity, the violation of Section 8(a)(3) is established without regard to whether the action is detrimental to the individual affected.[4] This principal was succinctly stated recently by the Second Circuit as follows (*N.L.R.B.* v. *Local 138, International Union of Operating Engineers*, 293 F. 2d 187, 197):

> * * * Whether the employee was discharged or only transferred is immaterial; no monetary loss to the employee is necessary to constitute a violation. *N.L.R.B.* v. *Milco Undergarment Co.*, 3 Cir., 1954, 212 F. 2d 801, 802, certiorari denied 1954, 348 U.S. 888, 75 S. Ct. 208, 99 L.Ed. 697.

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[4] Pp. 10-11 of the Board's opening brief. In addition to cases cited therein, see *Montgomery Ward & Co.* v. *N.L.R.B.*, 107 F. 2d 555, 563-564 (C.A. 7).

In order to hold the employer, however, there must at least be proof that he knew he was acting for an impermissible cause. For 'The relevance of the motivation of the employer in such discrimination has been consistently recognized under both § 8(a)(3) and its predecessor,' *Radio Officers' Union, etc.* v. *N.L.R.B.*, 1954, 347 U.S. 17, 43, 74 S. Ct. 323, 337, 98 L.Ed. 455, or, as recently said by Hr. Justice Harlan, concurring, in *Local 357, I.B.T., etc.* v. *N.L.R.B., supra*, 365 U.S. at page 680, 81 S. Ct. at page 842, 'In general, this Court has assumed that a finding of a violation of § § 8(a) 3, or 8(b) 2, requires an affirmative showing of a *motivation* of encouraging or discouraging union status or activity.' [5]

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[5] Respondent's assertion that the term "discrimination" connotes an "injurious or adverse effect" (Br. 23) not only is refuted by the quoted language from the Second Circuit opinion, but is contrary to the usual interpretation of such statutory language. Thus, Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (49 Stat. 1526, 15 U.S.C. 13(a)), provides that it shall be unlawful "to discriminate in price between different purchasers of commodities of like grade and quality * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce." In *F.T.C.* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, it was urged that the mere showing of a price difference was not enough to establish discrimination within the meaning of Section 2(a). The Supreme Court rejected the contention, concluding that (363 U.S. at 549): "there are no overtones of business buccaneering in the Section 2(a) phrase 'discriminate in price.' Rather a price discrimination within the meaning of that provision is merely a price difference."

CONCLUSION

For these reasons, as well as those set forth in our opening brief, we respectfully submit that a decree should issue enforcing the order of the Board in full.

STUART ROTHMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

ALLISON W. BROWN, JR.,
JUDITH BLEICH KAHN,
Attorneys,
National Labor Relations Board.

November 1961.

☆ U. S. GOVERNMENT PRINTING OFFICE; 1961 618245 545

No. 17,310

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

vs.

SOUTHERN CALIFORNIA ASSOCIATED NEWSPAPERS, a corporation d/b/a SOUTH BAY DAILY BREEZE, *Respondent.*

RESPONDENT'S PETITION FOR REHEARING.

O'MELVENY & MYERS,
CHARLES G. BAKALY, JR.,
433 South Spring Street,
Los Angeles 13, California,
Attorneys for Respondent.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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RESPONDENT'S PETITION FOR REHEARING.

To the Honorable Stanley N. Barnes, Charles M. Merrill and James R. Browning:

Respondent hereby petitions this Honorable Court for a rehearing with respect to its decision of January 5, 1962.

Grounds for This Petition.

1. This Court in its opinion now indicates that it did not consider Clark's reason for refusing to accept the better position. It is respectfully submitted that this Court erred by so refusing to consider such fact and had it done so this Court would have decided that Respondent's offer to Clark of a more desirable position was not a "discrimination" within the meaning of Section 8(a)(3) of the Act.

The Trial Examiner made evidentiary findings, which were adopted by the Board, that Respondent's conduct consisted of offering Clark the type of position he, Clark, had been trying to obtain.* Moreover, it was

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*This Court stated in its decision that ". . . the total pay [for the new position] was no greater than that which he had

found that had he accepted the new position, Clark would still have been performing work within the jurisdiction of the Union. It was further found that Clark declined the new position because the prospects of obtaining a still better job in Los Angeles, which had been promised by the Union if he lost his job through no fault of his own, seemed more attractive, and that Clark invented his objections to the new position offered by Respondent for the purpose of convincing the Union that he was justified in refusing the job and leaving Respondent, thereby requiring the Union to perform its promise of better employment in Los Angeles.*

This Court concurred in the findings described above. However, this Court held that the offer to Clark of the very type of job he had been seeking was a "discharge" because the offer was made in the form of an ultimatum and because the offer was made for an anti-Union purpose. By characterizing Respondent's conduct as a discharge, this Court cast an enormously prejudicial pall over the facts as developed in the record, which,

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been receiving (if anything, it was less) . . ." If the Court based its decision on this statement it erred because the amount of total pay received in the new position is not relevant under the circumstances in view of the fact that the hourly rate of pay was higher and Clark had wanted a job that entailed fewer hours; almost by definition the type of job Clark himself was attempting to obtain would almost certainly result in some decrease of his total pay. Moreover, the record itself is unclear as to the total pay Clark received per week as a fly boy because the number of hours worked varied. The Trial Examiner found that ". . . the trainee job offered to David by Collins was a better job at *increased pay* and that it was the type of job David and his father had been trying to get for David with Respondent." (Emphasis added.) [R. 15.] Moreover, it is undisputed that Clark did not decline the new position because the total pay was less than he had been receiving.

*This Court stated in its decision that Clark stated to Collins ". . . that he elected to continue as fly boy." This statement is inconsistent with the Trial Examiner's findings that Clark declined the new position in order to obtain the better employment in Los Angeles which the Union had promised. [R. 17.]

together with this Court's refusal to concern itself with Clark's reason for refusing to accept the new job, thereby caused an erroneous finding of "discrimination".

It is respectfully submitted that the instant case is directly analogous to a case where an employer mandatorily transfers an employee to another position within the bargaining unit and the employee quits rather than accept the new position. Such mandatory transfer is no different from the "ultimatum" given Clark in the instant case. However, such mandatory transfer has been construed by the Board as a discharge only if there was some rational relationship between the employer's conduct and the employee's leaving.* Under such circumstances the employee's reasons for not accepting the new job are extremely relevant. It is respectfully submitted that had this Court considered more fully Clark's reason for refusing to accept the more desirable job it would have found, as did the Trial Examiner, that Clark, in seizing upon this opportunity to leave Respondent's employ for greener pastures, had in fact quit, and that there was no rational relationship between Respondent's conduct and Clark's leaving. But for Clark's voluntary decision to accept the Union's offer of better employment in Los Angeles, he would still be employed by Respondent and would still be able to be represented by the Union.

2. In the context of the facts as set forth in the record, this Court could not reasonably have inferred that Respondent's conduct tended to have the effect of discouraging Union membership within the meaning of Section 8(a)(3) of the Act.

The Act makes conduct unlawful only if it has the effect of discouraging union membership. The Trial

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**Greenville Cabinet Co.,* 102 NLRB 1677, 1705 (1953); *Empire Pencil Co.* 86 NLRB 1187, 1194 (1949).

Examiner found that Respondent's conduct did not tend to discourage Union membership, but in fact would "if anything provide an example for encouraging Union membership." [R. 19.] This Court apparently agreed with the Trial Examiner that the conduct of Respondent did not have the effect upon Clark or upon any of the persons who were its employees on December 21, 1959, of discouraging Union membership.* Rather, it was a prospective fly boy** whom this Court inferred would be discouraged from Union membership.

It is respectfully submitted that such an inference is not a reasonable one in view of the evidence before the Trial Examiner and the Board. Shortly after Clark left his employment with Respondent, John Rinde was employed as a trainee and commenced his employment by performing the duties of the fly boy position. [R. 291, 306.]*** The Trial Examiner who heard and observed the witnesses did not infer that John Rinde was discouraged in Union activities by Respondent's conduct with respect to Clark. This Court, however, inferred that a prospective fly boy who was unqualified for the position of district manager would be discouraged in his Union activities by Respondent's conduct toward Clark, presumably because he would believe that if he joined the Union he would be discharged. It is respectfully submitted that the situation envisaged by this Court is im-

*This Court stated that "The area within which we are concerned, with discouragement of Union membership, is not the district manager's job; it is the job of fly-boy."

**Inasmuch as the evidence was undisputed that Clark was the only fly boy, when this Court referred to the effect upon an "unqualified flyboy" it must have been referring to a prospective boy.

***The finding of the Board, which was recited by this Court in its opinion, to the effect that Respondent was required temporarily to assign Clark's work to other employees for over a

possible of occurrence due to the trainee program which has, since December 19, 1959, prevailed in Respondent's mailroom because a fly boy unqualified for the position of district manager would be discharged irrespective of his Union activity. Under this trainee program the fly boy is in fact a trainee district manager, and according to long established practice in the newspaper business a trainee or apprentice may be discharged at any time if he is unqualified for promotion. Further, it cannot even reasonably be inferred that Respondent's conduct with respect to Clark would be communicated to a prospective fly boy in such a way as to discourage Union activity inasmuch as none of the other employees of Respondent were so discouraged.

This Court seems to have found an unfair labor practice to have been committed because it found that the Respondent believed that its fly boy should not belong to a Union. However, such a position standing alone is not unlawful. Many non-union employers have such a belief. It is only where such position is implemented by conduct which tends to discourage union activity that the position and conduct becomes unlawful. It is respectfully submitted that in the instant case the conduct of Respondent was not such as to discourage Union activity on the part of any of its employees.

Conclusion.

For the reasons hereinabove stated Respondent requests that this petition for a rehearing be granted, and that the Court, upon re-examining the case in light of the considerations set forth above, enter a decree denying enforcement of the order of the Board.

Dated: February 1, 1962.

Respectfully submitted,

O'Melveny & Myers,
Charles G. Bakaly, Jr.,
Attorneys for Respondent.

Certificate of Counsel.

CHARLES G. BAKALY, JR., counsel of record for Respondent, certifies that he has prepared the contents of the foregoing Respondent's Petition for Rehearing and that in his judgment said petition is well founded and that it is presented in good faith and is not interposed for purposes of delay.

CHARLES G. BAKALY, JR.,
Attorney for Respondent.

No. 17310

United States Court of Appeals

for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

SOUTHERN CALIFORNIA ASSOCIATED NEWSPAPERS, d/b/a SOUTH BAY DAILY BREEZE,

Respondent.

Transcript of Record

Petition for Enforcement of an Order of the National Labor Relations Board

Parker & Son, Inc., Law Printers, Los Angeles. 5-24-61—7-6-61

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NATIONAL LABOR RELATIONS BOARD,

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

MARCEL MALLET-PREVOST,
Assistant General Counsel,
National Labor Relations Board,
Washington 25, D.C.

Attorney for Petitioner.

O'MELVENY & MYERS,
CHARLES G. BAKALY, JR.,
433 South Spring Street,
Los Angeles, California,

Attorneys for Respondent.

GENERAL COUNSEL'S EXHIBIT 1-C

United States of America
Before the National Labor Relations Board
Twenty-First Region

Case No. 21-CA-3850

SOUTH BAY DAILY BREEZE

and

DAVID CLARK, An Individual

COMPLAINT AND NOTICE OF HEARING

It having been charged by David Clark, an individual, that South Bay Daily Breeze (herein called Respondent) has been engaging in and is engaging in unfair labor practices affecting commerce as set forth in the Labor Management Relations Act, 1947, as amended, herein called the Act, the General Counsel of the National Labor Relations Board (herein called the Board), on behalf of the Board, by the undersigned Regional Director, issues this Complaint and Notice of Hearing pursuant to Section 10 (b) of the Act and Section 102.15 of the Board's Rules and Regulations, Series 8.

1. The charge was filed by David Clark on December 24, 1959, and was served on Respondent on December 28, 1959, by registered mail.

2. Respondent is, and at all times material hereto has been, a corporation duly organized under and existing by virtue of the laws of the State of California, having its principal office and place of business in the City of Redondo Beach, California, where it is now,

and at all times material hereto has been, continuously engaged at said place of business in the publication, sale and distribution of newspapers.

3. Respondent holds membership in and subscribes to interstate news services, to wit, Associated Press and United Press International, and publishes national syndicated features and advertises nationally sold products. Respondent, in the course and conduct of its business operations during the past 12-month period, received a gross annual income in excess of $200,000. Its annual purchases of newsprint originating outside the State of California exceed $10,000 in value.

4. Respondent is and at all times material herein has been engaged in commerce and in business affecting commerce within the meaning of Section 2, subsections (6) and (7) of the Act.

5. Mailers Union No. 9, International Typographical Union, AFL-CIO, herein called the Union, is a labor organization within the meaning of Section 2, subsection (5) of the Act.

6. Respondent did on or about December 21, 1959, discharge David Clark.

7. Respondent has since the date of discharge set out in paragraph 6 above failed to, refused to and continues to refuse to reinstate the employee named above to his former or substantially equivalent position or employment.

8. Respondent did discharge and refuse or fail to reinstate the employee named above for the reason that he joined or assisted the Union or engaged in other concerted activities for the purposes of collective bargaining or other mutual aid or protection.

9. By the acts described in paragraphs 6, 7 and 8 above, Respondent did discriminate and is discriminating in regard to the hire or tenure or terms or conditions of employment of the employee named above, and did thereby engage in and is thereby engaging in unfair labor practices within the meaning of Section 8 (a), subsection (3) of the Act.

10. By the acts described in paragraphs 6, 7, 8 and 9 above, and by each of said acts, Respondent did interfere with, restrain and coerce and is interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, and did thereby engage in and is thereby engaging in unfair labor practices within the meaning of Section 8 (a), subsection (1) of the Act.

11. The activities of Respondent described in paragraphs 6, 7, 8, 9 and 10 above, occurring in connection with the operations of Respondent described in paragraphs 2, 3, and 4 above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce within the meaning of Section 2, subsections (6) and (7) of the Act.

12. The activities of Respondent, as set forth in paragraphs 6, 7, 8, 9, 10 and 11 above, constitute unfair labor practices affecting commerce within the meaning of Section 8 (a), subsections (1) and (3), and Section 2, subsections (6) and (7) of the Act.

Please take notice that on the 15th day of March 1960, at 10:00 a.m., PST, in Hearing Room No. 1, on the Mezzanine Floor, 849 South Broadway, Los An-

geles, California, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the above Complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony.

You are further notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, the Respondent shall file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and four (4) copies of an Answer to said Complaint within ten (10) days from the service thereof and that unless it does so all of the allegations in the Complaint shall be deemed to be admitted to be true and may be so found by the Board.

Wherefore, the General Counsel of the National Labor Relations Board, on behalf of the Board, this 18th day of February 1960, issues this Complaint and Notice of Hearing against South Bay Daily Breeze, the Respondent herein.

/s/ RALPH E. KENNEDY,
Regional Director
National Labor Relations Board
Twenty-First Region
849 South Broadway
Los Angeles 14, California

Admitted in Evidence March 15, 1960.

[Title of Board and Cause.]

ANSWER OF RESPONDENT SOUTHERN CALIFORNIA ASSOCIATED NEWSPAPERS, A CORPORATION DOING BUSINESS AS SOUTH BAY DAILY BREEZE

Respondent, Southern California Associated Newspapers, a corporation doing business as South Bay Daily Breeze, for answer to the complaint herein admits, denies and alleges as follows:

1. Denies each and every allegation of paragraph 5, except alleges as follows: Respondent is without knowledge or information sufficient to form a belief as to the truth of the allegations of said paragraph.

2. Denies each and every allegation of paragraphs 6, 7, 8, 9, 10, 11 and 12.

Wherefore, this respondent prays that the complaint be dismissed.

O'MELVENY & MYERS
/s/ By CHARLES G. BAKALY, Jr.
Attorneys for Respondent,
Southern California Associated
Newspapers, a corporation doing
business as South Bay Daily Breeze

Affidavit of Service by Mail Attached.

Admitted in Evidence March 15, 1960.

[Title of Board and Cause.]

INTERMEDIATE REPORT AND RECOMMENDED ORDER

Statement of the Case

This matter was tried in Los Angeles, California, on March 15 and 17, 1960. The question presented is whether one David Clark's termination from Respondent's employ was a violation of Section 8(a)(3) of the Act.

Upon the entire record, consideration of briefs submitted by General Counsel and Respondent, and from my observation of the witnesses, I make the following:

Findings of Fact

I. The business of the Company

The complaint alleges, the answer admits, and it is found Respondent is engaged in commerce and in a business affecting commerce within the meaning of the Act. Its business is that of a publisher in Redondo Beach, California, in the Los Angeles metropolitan area.[1]

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[1]Respondent is engaged in the business of publishing, selling and distributing newspapers including a daily newspaper called the South Bay Daily Breeze. Respondent holds membership in and subscribes to Interstate News Services, to wit, Associated Press and United Press International and publishes nationally syndicated features and advertises nationally sold products. Respondent in the course of operating such business received a gross annual income in excess of $200,000, and its purchases of newsprint originating outside the State of California exceeded $10,000 in value in 1959.

II. The labor organization involved

Mailers Union No. 9, International Typographical Union AFL-CIO, herein called the Union is a labor organization within the meaning of the Act.[2]

III. The alleged unfair labor practices

A. Background and events

David Clark, the charging party, a youth 19 years of age was previously employed by Respondent for about 3 years commencing in 1954. At that time he was delivering newspapers to homes under the supervision of district managers of Respondent including Harold Collins, who is presently the circulation manager. After approximately a year's absence he returned to work in Respondent's mailroom as a fly boy. The fly boy in the newspaper business is apparently someone who is engaged in taking the newspapers from the press or from the conveyer leading from the press prior to further handling. While Collins knew David as a newspaper carrier he became interested in him and he testified that he was instrumental in obtaining David's job as a fly boy with Respondent. The record reflects that David and Collins were good friends as well as Collins and David's father Bernard Clark. A topic of frequent conversation among all three was the best way in which David could enhance his prospect for a career by attending school. At Bernard Clark's request Collins urged David on many occasions to complete his education.

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[2]Although the status of the labor organization was put in issue by the answer, Respondent stipulated to the status of the labor organization during the course of the hearing.

David Clark last worked for Respondent on or about December 19, 1959, a Saturday, except for a brief period on December 21. At the time of his termination he was working in the mailroom of Respondent and the record reflects that on weekends two other teenage boys also were employed in the mailroom. The seven district managers who were in charge of the boys that delivered papers to homes also performed some of the mailroom work that in other newspapers was ordinarily performed by members of the mailers union. David had received periodic raises in pay during his year and a half as a fly boy, and on December 19, 1959 his rate of pay was $1.50 an hour. On this day his hourly rate was increased to $1.67 an hour. He was paid at this rate for December 21 and for three extra days which he did not work.

Bernard Clark testified that he was dissatisfied with David's rate of pay and with the long hours that he worked on Saturdays and that he was aware of the fact that union mailers in the Los Angeles area were earning in excess of $3 an hour. He was a member of a printers local of the International Typographical Union. On or about November 1, 1959 he approached an official of the mailers local of the same union and complained, according to him about the long hours David and the two other teenage boys were working on weekends. As a result of this a Mr. Fred Leathem, an organizer for the Union, came to the Clarks' residence on Tuesday, December 15, 1959 in the morning. On this occasion in the presence of his father, David was initiated into the Union as a journeyman. Leathem testified that David was not a qualified journeyman

and that he only had to pay an initiation fee of $10 rather than the usual one of $105. He explained this deviation from normal practice of eliminating an apprenticeship period and accepting a reduced initiation fee as occurring in connection with organizing new plants.

On December 24, 1959 David, in a signed affidavit given to a Board agent, recited that Respondent had seven full-time and seven part-time mailers. Leathem and David Clark both testified David had told Leathem that David and two other teenage boys were the only employees in the mailroom. At other points the record reflects that David testified that Dennis Daines was a mailer at least until December 15, and there were two employees who were union mailers who worked for Respondent on Wednesday nights. The record is clear that Leathem did not inquire from David as to the identity or addresses of the two teenage boys who worked with David in the mailroom on weekends.

Bernard Clark who was present during this conversation at first testified that Leathem told David that it was a condition of being admitted to the Union that David keep his fly boy job with Respondent. He then changed his testimony and stated that the only condition that Leathem mentioned was that David stay on with the Daily Breeze. Leathem testified that he told David that if he lost his job through no fault of his own, the Union would get him another part-time job. At this time the Clarks knew that journeyman mailers were receiving in excess of three ($3) dollars an hour in the Los Angeles area.

Collins approached David the following Friday which was December 18, and inquired whether he had been contacted by the Union and David informed him that he had. However, David told him that he did not have a Union card. David's affidavit to the Board dated December 24, 1959 reflects a statement that on December 19, 1959 he told Collins one of the reasons he could not accept a new job offered to him by Collins was because he had joined the Union. His testimony is to the contrary. According to Collins the reason he asked David on December 18 whether he had been contacted by the Union was because some printers had told him there were men around the building for the mailers union and asked David if he had been approached by them.

Collins, on December 19, offered David a job which would pay him $1.67 an hour and would permit him to work more desirable hours on Saturdays. This raise in pay and shorter Saturday hours had been an objective of the Clarks for several months. The testimony of the Clarks that the increased cost of insurance and gasoline was stated to Collins as a reason for refusing the new job on December 19 and 21 is not credited. Collins testified that he did not recall mention of this in his discussions with David and his father. When the Clarks testified that neither inquired from Collins as to the basis of reimbursement for the use of David's car it was manifest that not only was this a fictitious reason for declining the new job but also it was not given to Collins as a reason.

In view of Bernard Clark's other testimony and the equivocal nature of his testimony with relation to his

conversation with an insurance agent in approximately June of 1959, no probative weight is given to his testimony that he had reason to believe increased insurance rates on David's car would eventuate if he used it in business based on this June 1959 conversation. At any rate, there is no basis in the record to find that the Clarks had a reasonable basis to believe David would not be reimbursed for any increased insurance costs.

David Clark was asked the following question referring to a conversation with Collins on Saturday, December 19 and gave the following answer:

Q. During the conversation during the 19th, Mr. Clark, did you give as a reason for not taking this job the fact that you were attempting to obtain a job as a mailer in Los Angeles where you could work two shifts a week with many less hours and make more money then you were making at the Daily Breeze?

A. No. On Monday I said that.

In his testimony at another point in the record he denies that he told Collins working in Los Angeles for more money was a reason for his refusing the new job offered him by Collins.

It is clear that on Monday, December 21, Collins made it clear to David that if he did not accept the new job he could no longer keep his job as fly boy. After David left the employ of Respondent on December 21 he went to work that evening as a journeyman mailer at approximately double the hourly pay he had earned while working for Respondent.

He also testified that the new job for David which he labeled a trainee had been approved by a Mr. Curry,

the publisher, on December 15, and although David was at work on December 16, 17, and 18 he did not tell him of the new job until the morning of December 19. He also testified that he had a discussion with Curry on the evening of the 18th. As a reason for not telling David previously about the new job, Collins stated that it was his practice to hand the man who received a raise his check at the end of the pay period and offer him congratulations. Respondent's pay period ended on a Friday, and David received his regular pay the following Tuesday. Collins testified on a Thursday and he stated he was going to inform two men on that day they were to receive increases when he gave them their checks. He also testified that Friday was the end of the pay period and Tuesday was the day the employees received their checks.

David Gagnon, an employee of Respondent, testified he was present at the conversation of December 19 between David and Collins. His testimony is credited that David did not state to Collins the reason he did not take the new job was because the car insurance would be too expensive. He also testified credibly that on December 21 Collins pointed out to David that the new job would be more compatible with his schooling and future career. His credited testimony was also to the effect that David told Collins that he could not take the new job with Respondent and that he would be working just a couple of nights a week for twenty four ($24.00) dollars a night and that he would have more time for his studies.

Fred Leathem, an organizer for the Union, testified that his union was interested in organizing only employ-

ees who worked inside the mailroom of publishing establishments. However, a copy of a collective bargaining contract was introduced indicating that a bargaining unit of Mr. Leathem's local incorporated in a collective bargaining contract job descriptions including "conveying of newspapers by trucks anywhere in the plant." Respondent's brief cited another case in which another mailers local stipulated a bargaining unit which included in the job descriptions "all employees doing work pertaining to mailing including delivering papers to mailers, carriers, agents or newsboys." American Publishing Co., 121 NLRB 115. This would apparently cover the jobs of Respondent's district managers. It is found that the trainee job offered to David by Collins was a better job at increased pay and that it was the type of job David and his father had been trying to get for David with Respondent.

Discussion and Analysis

On the basis of the foregoing it is found that both Clarks and Collins, the principal actors, testified falsely to material facts. Leathem's testimony is open to suspicion also and is rejected insofar as it supports the testimony of the Clarks. Gagnon's testimony which was of minor significance is the only portion of the record that does not contain obvious errors or misstatements of fact.

Being unable to rely on the version of the main witnesses with respect to the events in question, findings will be made on what appears to be the most plausible hypothesis.

After Leathem's visit to the Clark home on Decem-

ber 15 he probably went to Respondent's plant and talked with some employees. News of this related to Collins induced him to ask David on December 18 as to whether he had been contacted. In view of the fact the record does not contain any indication that Leathem approached any official of Respondent on behalf of David it would appear that Leathem was under the impression from his initial contact with David that there were more mailers to be organized, perhaps seven full-time and seven part-time as David told the Board representative on December 24, 1959. Leathem's apparent lack of interest in the other two teenage boys who worked on weekends suggests that David was regarded as one of the purported full-time mailers. When Leathem visited the plant of Respondent he ascertained that there were no full-time mailers except David and either had no interest in or was unsuccessful in organizing the district managers who did some mailing work. In any event he never did approach management with respect to representing any of its employees. The Clarks' eagerness to have David earn more money for shorter hours probably led David to exaggerate the number of mailers employed by Respondent when talking to Leathem. It is clear that Collins offered David a job which was a better one and for more pay. It also seems clear that the reason David did not accept it was because of Leathem's assurance that if he lost his job through no fault of his own he could get a couple of nights' work a week at double the hourly rate. The objection with respect to the increased automobile expenses was invented to convince the Union he was being given a worse job because he had joined the Union.

This objection of increased auto costs was not conveyed to Collins by either of the Clarks. Although the job Collins offered David was substantially better and of the type he and his father had been trying to obtain for some months, the prospects of getting two nights' work at double the pay seemed more attractive and David declined the job offered by Collins.

Collins apparently mistakenly believed that giving David a better job and taking him out of the mailroom in some way would delay union organization of the mailroom. One of the anomalies of this record which is totally unexplained is that two union mailers whom Collins knew as such, worked for Respondent on Wednesday nights. In short it is found that Collins offered David a better job based on the belief that it might prevent David from being represented by the Union in Respondent's mailroom. The fact that David would not be permitted to continue his fly boy job along with the spurious reasons given by Collins for not telling David about the new job until December 19 after he learned David had been contacted by the Union on December 18 support this finding, as well as Collins' own testimony that Respondent's mailroom was not ready for a union.

In making a resolution as to whether unfair labor practices were committed by Respondent the following sections of the Act are pertinent.

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activi-

ties for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:

The General Counsel in his brief cites Continental Oil Company v. N. L. R. B., 113 F. 2d 473 (C. A. 10) and Southeastern Pipeline Co., 103 NLRB 341, for the proposition that transfer of an employee to another job may be an act of discrimination even though the job was better. An examination of those cases reveals the employees were transferred to less desirable jobs. Here David was offered a better job. Here the evidence preponderates that in David's new job with Respondent he could have remained a member of the Union and if the Union had so desired it could have attempted to represent him in collective bargaining. Accepting David's testimony that he was the only full-

time mailroom employee, I do not find that the offer to him of a better job in any way inhibited union organization or constituted conduct in any way proscribed by Section 8 of the Act. The fact that Collins mistakenly was under the belief that David's transfer might tend to impede union organization in the mailroom is not regarded as sufficient to establish an unfair labor practice in the context of the facts here presented. Respondent's action in offering a better job if anything would provide an example for encouraging union membership.

Conclusions of Law

Respondent is engaged in commerce and in activities affecting commerce within the meaning of the Act.

The Respondent has not engaged in unfair labor practices as alleged in the complaint.

Recommendation

It is recommended that the complaint be dismissed in its entirety.

Dated this 8 day of June 1960.

/s/ By EUGENE K. KENNEDY,
Trial Examiner

[Title of Board and Cause.]

DECISION AND ORDER

On June 8, 1960, Trial Examiner Eugene K. Kennedy issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the General Counsel and Respondent filed exceptions to the Intermediate Report and supporting briefs.

Pursuant to the provisions of Section 3 (b) of the Act, the Board has delegated its power in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record, and hereby adopts the evidentiary findings of the Trial Examiner but not his conclusions or recommendations inconsistent with our decision herein.

As the record shows, the charging party, David Clark, was employed by the Respondent as a flyboy in the mailroom. His duties consisted of taking newspapers from a conveyor to the mailroom and there preparing them for further distribution. On or about December 15, 1959, Clark joined Mailers Local No. 9 of the International Typographical Union, AFL-CIO. On December 18, Circulation Manager Howard Collins inquired whether he had been contacted by the Union. Clark

informed Collins that he was a member of the Union. On the following day, Collins offered Clark a promotion to District Manager Trainee, a newly created position. Clark refused the new job, and was thereupon released by the Respondent, even though this required the Respondent to temporarily assign Clark's work to other employees for more than a month. When Clark returned to pick up his pay he had occasion to converse with Collins, at which time Collins made the statement that the mailroom was not yet ready for a union.

The Trial Examiner found that Collins believed taking Clark out of the mailroom would delay or impede Union organization, and that upon learning of Clark's Union membership Collins refused to permit him to continue his current job in the mailroom based on the belief that the new job might prevent him from being represented by the Union. We agree with these findings. However, the Trial Examiner recommended dismissal of the complaint, on the theory that the promotion offered Clark would not in fact have inhibited Union organization nor prevented Clark's continued representation by the Union.

We disagree with the Trial Examiner's theory, for reasons stated in recent decisions.[1] We adhere to the principle that changes in the terms and conditions of employment based upon the fact or absence of union membership or designation are discriminatory within the meaning of the Act. To decide otherwise would in

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[1]W. L. Rives Company, 125 NLRB 772; Combined Century Theaters, 123 NLRB 1759.

effect allow an employer who wished to get rid of an employee for anti-union reasons to do so by offering the employee an alternative of a promotion or a discharge, hardly within the contemplation of the Act.

We do not accept the Respondent's defense of economic motivation, as we find no support for it from any credited testimony. We likewise do not accept the Respondent's assertion in its brief that "the fact that the conduct was motivated by anti-union consideration is immaterial." Accordingly, we find that by questioning Clark about his Union membership, and by offering him a promotion and then precipitately discharging him with the anti-union motivation found by the Trial Examiner, the Respondent has violated Section 8 (a) (1) and (3) of the Act.

Remedy

Having found the Respondent has engaged and is engaging in unfair labor practices in violation of Section 8 (a) (1) and (3) of the Act, we shall order that it cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act. As Respondent has discriminatorily discharged and thereafter failed to reinstate Clark, we shall order that the Respondent offer him immediate and full reinstatement to his former or substantially equivalent position without prejudice to his seniority or other rights and privileges previously enjoyed. We shall also order that Respondent make Clark whole for any loss of pay he may have suffered by reason of the discrimination against him by payment of a sum of money equal to that which he would have earned as wages from the

date of such discrimination to the date reinstatement is offered; the backpay to be computed in the manner set forth in F. W. Woolworth Company, 90 NLRB 289. In accordance with our usual practice, the backpay is to be tolled from the date of the Intermediate Report to the date of this Order. Custom Underwear Mfg. Co., 108 NLRB 117. It will also be ordered that the Respondent preserve and upon request make available to the Board or its agents all pertinent records necessary to compute the amount of backpay due under this order.

Order

Upon the entire record in this case, and pursuant to Section 10 (c) of the National Labor Relations Act as amended, the National Labor Relations Board hereby orders that the Respondent, Southern California Associated Newspapers, d/b/a South Bay Daily Breeze, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Mailers Union No. 9, International Typographical Union, AFL-CIO, or any other labor organization of its employees, by discharging them or in any other manner discriminating in regard to their hire or tenure of employment or any terms or conditions of their employment;

(b) Interrogating its employees concerning their membership in or activities in behalf of said Union or any other labor organization in a manner constituting interference, restraint and coercion in violation of Section 8 (a) (1) of the Act, or in any other manner interfering with restraining or coercing its employees

in the exercise of their rights as guaranteed under Section 7 of the Act.

2. Take the following affirmative action, which it is found will effectuate the policies of the Act:

(a) Offer David Clark immediate and full reinstatement to his former or substantially equivalent position without prejudice to his seniority or other rights and privileges previously enjoyed and make him whole in the manner set forth in the "Remedy" section above;

(b) Post in its plant at Redondo Beach, California, copies of the notice attached hereto marked "Appendix."[2] Copies of said notice, to be furnished by the Regional Director for the Twenty-first Region, shall, after being duly signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof and maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(c) Preserve and make available to the Board or its agents upon request, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other rec-

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[2]In the event that this Order is enforced by a decree of a United States Court of Appeals, the notice shall be amended by substituting for the words, "PURSUANT TO A DECISION AND ORDER" the words, "PURSUANT TO A DECREE OF THE UNITED STATES COURT OF APPEALS, ENFORCING AN ORDER".

ords necessary to compute the amount of backpay due under the terms of this Order;

(d) Notify the Regional Director for the Twenty-first Region, in writing, within ten (10) days from the date of this Order what steps the Respondent has taken to comply herewith.

Dated, Washington, D. C. Feb. 9, 1961.

[Seal] PHILIP RAY RODGERS,
Member,
JOHN H. FANNING,
Member,
ARTHUR A. KIMBALL,
Member,
National Labor Relations Board

Appendix

Notice to All Employees Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We Will offer to David Clark immediate and full reinstatement to his former or substantially equivalent position without prejudice to any seniority or other rights and privileges previously enjoyed, and will make whole said employee for any loss of pay suffered as a result of our discrimination against him.

We Will Not interrogate our employees concerning their membership in or activities on behalf of Mailers

Local No. 9, International Typographical Union, AFL-CIO, or any other labor organization.

We Will Not in any other manner interfere with, restrain or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist the Union named above, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in the Act as amended.

All our employees are free to become or remain members of the above-named Union or any other labor organization. We will not discriminate in regard to hire or tenure of employment or any term or condition of employment against any employee because of membership in or activity on behalf of any such labor organization.

Southern California Associated Newspapers
d/b/a South Bay Daily Breeze
(Employer)

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

[Title of Board and Cause.]

EXCEPTIONS OF RESPONDENT SOUTHERN CALIFORNIA ASSOCIATED NEWSPAPERS TO THE INTERMEDIATE REPORT.

Pursuant to the provisions of the Labor Management Relations Act, 1947, as amended, and the Rules and Regulations of the National Labor Relations Board, particularly Section 102.46 thereof, Respondent Southern California Associated Newspapers hereby takes exception to the following omissions of the Trial Examiner and to the following findings of fact and conclusions of the Intermediate Report:

1. The finding that Collins apparently believed that giving David a better job and transferring him out of the mailroom in some way would delay union organization of the mailroom (I. R. p. 5, lines 29-31; p. 6, lines 12-14).

2. The finding that Collins offered David a better job based on the belief that it might prevent David from being represented by the Union in Respondent's mailroom (I. R. p. 5, lines 33-35).

3. The finding that the reasons given by Collins for not telling David about the new job until December 19 after he learned David had been contacted by the Union on December 18 were spurious (I. R. p. 5, lines 35-40).

4. The finding that Collins testified falsely to material facts (I. R. p. 4, lines 43-44).

5. The failure to find that the actions of the Respondent were not intended to discourage membership in the Union or to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

6. The failure to find that the actions of the Respondent were motivated by economic considerations.

7. All rulings and omissions of the Trial Examiner and all findings, conclusions and orders of the Intermediate Report upon which Exceptions 1 through 6 are based.

Dated: July 25, 1960.

Respectfully submitted,

O'MELVENY & MYERS

/s/ By CHARLES G. BAKALY, JR.

Attorneys for Respondent Southern California Associated Newspapers.

Affidavit of Service by Mail Attached.

[Title of Board and Cause.]

EXCEPTIONS OF COUNSEL FOR GENERAL COUNSEL

Comes now Counsel for the General Counsel and respectfully files these his Exceptions to the Intermediate Report and Recommended Order of Eugene K. Kennedy, Trial Examiner herein:

For that the Trial Examiner did find:

Page 6, Lines 9-17, Exception No. 1.—"Accepting David's testimony that he was the only full-time mailroom employee, I do not find that the offer to him of a better job in any way inhibited union organization or constituted conduct in any way proscribed by Section 8 of the Act. The fact that Collins mistakenly was under the belief that David's transfer might tend to impede union organization in the mailroom is not regarded as sufficient to establish an unfair labor practice in the context of the facts here presented. Respondent's action in offering a better job if anything would provide an example for encouraging union membership."

For that the Trial Examiner did conclude:

Page 6, Lines 24-25, Exception No. 2.—"Respondent has not engaged in unfair labor practices as alleged in the complaint."

For that the Trial Examiner did recommend:

Page 6, Lines 29, Exception No. 3.—". . . that the complaint be dismissed in its entirety."

For that the Trial Examiner did not find:

Exception No. 4.—That the Respondent discharged David Clark on or about December 21, 1959, for the reasons that he joined or assisted the Union or engaged in other concerted activity for the purposes of collective bargaining or other mutual aid or protection.

Exception No. 5.—That the Respondent's offer of a specially created position to David Clark, when prompted by antiunion motives is discriminatory within the meaning of the Act.

For that the Trial Examiner did not conclude:

Exception No. 6.—That the acts described in Exception No. 2 and No. 3 alone, or that the acts described in Exception No. 2 in conjunction with the acts described in Exception No. 3, Respondent engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) and (3) of the Act.

For that the Trial Examiner did not recommend:

Exception No. 7.—That the Respondent be ordered to cease and desist from its unfair labor practices to reinstate David Clark to his former or substantially equivalent position and make him whole for any loss of pay suffered by him because of Respondent's unlawful action, and to post and maintain appropriate notices.

Respectfully submitted,

/s/ By DANIEL S. MARK
Counsel for the General Counsel
National Labor Relations Board

Dated at Los Angeles, California,
this 25th day of July 1960.

United States Court of Appeals
For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

SOUTHERN CALIFORNIA ASSOCIATED NEWSPAPERS, d/b/a SOUTH BAY DAILY, BREEZE,

Respondent.

CERTIFICATE OF THE NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 102.116, Rules and Regulations of the National Labor Relations Board —Series 8, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of a proceeding had before said Board and known upon its records as Case No. 21-CA-3850. Such transcript includes the pleadings and testimony and evidence upon which the order of the Board in said proceeding was entered, and includes also the findings and order of the Board.

Fully enumerated said documents attached hereto are as follows:

1. Stenographic transcript of testimony taken before Trial Examiner Eugene K. Kennedy on March 15

and 17, 1960, together with all exhibits introduced in evidence at the hearing.

2. Copy of Trial Examiner Kennedy's Intermediate Report and Recommended Order dated June 8, 1960. (Annexed to item 5 below.)

3. Respondent's exceptions to the Intermediate Report received July 25, 1960.

4. General Counsel's exceptions to the Intermediate Report received July 26, 1960.

5. Copy of Decision and Order issued by the National Labor Relations Board, on February 9, 1961, with Intermediate Report and Recommended Order attached.

In Testimony Whereof, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 24th day of April, 1961.

[Seal]

/s/ OGDEN W. FIELDS
Executive Secretary
National Labor Relations Board

Before the National Labor Relations Board
Twenty-First Region

Case No. 21-CA-3850

SOUTHERN CALIFORNIA ASSOCIATED NEWSPAPERS, A Corporation dba SOUTH BAY DAILY BREEZE,

Respondent,

and

DAVID CLARK, An Individual,

Charging Party.

Hearing Room 1, 849 South Broadway, Los Angeles, California. Tuesday, March 15, 1960.

Pursuant to notice, the above-entitled matter came on for hearing at 10:00 o'clock, a.m.

Before:

Eugene Kennedy, Trial Examiner.

Appearances:

Daniel S. Mark, Esq., 849 South Broadway, Los Angeles, California, representing the General Counsel of the Twenty-First Region. O'Melveny & Myers by Charles G. Bakaly, Jr., 433 South Spring Street, Los Angeles, California, representing Respondent. [1]*

* * * * *

PROCEEDINGS

Trial Examiner Kennedy: The hearing will be in order.

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*Page numbers appearing at top of page of Original Transcript of Record.

This is a formal hearing in the matter of South Bay Daily Breeze, Case Docket No. 21-CA-3850.

The Trial Examiner conducting the hearing is Eugene Kennedy.

I will ask counsel participating to state their names and appearances for the record, if they will, please.

Mr. Mark: Appearing for the Counsel for the General Counsel, Daniel S. Mark, 849 South Broadway, Room 600, Los Angeles, California.

Mr. Bakaly: For the Respondent, O'Melveny & Myers, by Charles G. Bakaly, Jr.

I might say at this time, Mr. Examiner, that the correct name of the Respondent is Southern California Associated Newspapers, a corporation doing business as South Bay Daily Breeze.

For the purposes here, it is perfectly all right with us to refer to it as the South Bay Daily Breeze throughout the hearing.

Trial Examiner: The record will reflect that.

I have not seen the pleadings yet, so if there is a problem there, we will come to it later.

Mr. Bakaly: I don't think it will be any problem.

Trial Examiner: Thank you. [3]

I think the only thing I will remind counsel is that obviously if there are written exhibits, why the Board rules require that they will be submitted in duplicate.

Do you have the formal papers, Mr. Mark?

Mr. Mark: Yes.

Mr. Trial Examiner, counsel for the General Counsel would like to move for the admission of the ex-

hibits, the following formal exhibits that I shall ask the reporter to mark for identification as:

General Counsel's Exhibit 1-A a charge filed by David Clark, an individual filed on December 24, 1959.

(Thereupon, the papers above-referred to were marked General Counsel's Exhibit No. 1-A for identification.)

Mr. Mark: As General Counsel's Exhibit 1-B, notice of filing of the charge with postal card return receipts attached, dated December 28, 1959.

(Thereupon, the papers above-referred to were marked General Counsel's Exhibit 1-B for identification.)

Mr. Mark: As Exhibit 1-C, the complaint and notice of hearing, dated February 18, 1960.

(Thereupon, the papers above-referred to were marked General Counsel's Exhibit No. 1-C for identification.)

Mr. Mark: As Exhibit 1-D, the affidavit of service of the complaint and notice of hearing with postal card return receipts attached, dated February 18, 1960. [4]

(Thereupon, the papers above-referred to were marked General Counsel's Exhibit No. 1-D for identification.)

Mr. Mark: As Exhibit 1-E, the answer of the respondent with affidavit of service attached, dated February 29, 1960.

(Thereupon, the papers above-referred to were marked General Counsel's Exhibit No. 1-E for identification.)

Mr. Mark: I will show these to respondent's counsel.

I would like to move for their receipt into evidence.

Mr. Bakaly: No objection.

Trial Examiner: They will be received as General Counsel's Exhibit 1 with the sub-divisions noted.

(The documents heretofore marked General Counsel's Exhibit 1-A thru -E for identification, were received in evidence.)

Trial Examiner: If you will indulge me, I am going to take a brief look at the pleadings. We will just take a five-minute recess.

(Short recess.)

Trial Examiner: On the record.

Mr. Mark, proceed, please.

Mr. Mark: At this time, Mr. Trial Examiner, I would like to move to amend the complaint in the following particulars, and that is the name of the respondent to read properly Southern California Associated Newspapers, a corporation doing business as South Bay Daily Breeze. [5]

Mr. Bakaly: No objection.

Trial Examiner: I notice all of the captions include the respondent as South Bay Daily Breeze except the respondent follows the caption with another heading to show the whole title.

Well, let the record show the complaint may be amended in accordance with the wording that the General Counsel stated. If the name weren't so long, I would suggest that we amend the complaint on its face, but I am not sure that it would be feasible, and of course, it will appear in the transcript. I wonder if you could just prepare a title page showing the amend-

ment to the complaint with that name which we can put in the formal exhibits as the next sub-division.

Mr. Mark: Certainly, I can arrange that.

Trial Examiner: With respect to the transcript the motion to amend the complaint should be reflected on the title page of the transcript. I would like the reporter to make a note of that. The title of the hearing that I indicated when hearing opened was not the whole entire title.

Go ahead, Mr. Mark.

Mr. Mark: I would like to offer the following stipulation: That Mailers Union No. 9, International Typographical Union, AFL-CIO is a labor organization within the meaning of Section 2, Sub-section 5 of the Act.

Mr. Bakaly: So stipulated. [6]

Mr. Mark: At this time, the counsel for the General Counsel would like to call as its first witness David Clark.

DAVID CLARK

a witness called by and on behalf of the General Counsel, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Mark): Mr. Clark, would you state your full name for the purposes of the record, please?

A. David Guy Clark.

Q. How old are you, David?

A. Nineteen.

Q. What is your present occupation?

A. I am a mailer.

(Testimony of David Clark.)

Q. I beg your pardon?

A. A mailer.

Q. Would you please speak up louder?

A. Okay.

Q. Are you presently employed?

A. Well, not at any one place, definitely.

Q. What is the nature of your occupation?

A. Well, I would like—I work at a, you know, newspaper, you know, mostly mailing work.

Q. In the course of the past year, were you employed by the South Bay Daily Breeze? A. Yes. [7]

Mr. Mark: May we go off the record?

Trial Examiner: Yes.

(Discussion off the record.)

Trial Examiner: On the record.

I might state that in an off-the-record discussion, counsel indicated that when reference is made to the Daily Breeze or the South Bay Daily Breeze, that that reference is directed to the respondent involved here.

All right, Mr. Mark.

Q. (By Mr. Mark): When were you employed by the Daily Breeze, David?

A. I was first employed on—let's see. I think it was July 4th, 1958.

Q. How long did you work there?

A. It must have been about a year and a half, maybe a little more.

Q. Do you recall what day it was that you left the South Bay Daily Breeze?

(Testimony of David Clark.)

A. Let's see. It was the Monday before Christmas. It would be the 20th or the 21st or something like that.

Trial Examiner: 1959?

The Witness: '59, yes.

Q. (By Mr. Mark): What was your position with the South Bay Daily Breeze?

A. I was a flyboy. [8]

Q. Could you describe your job duties as a flyboy, please?

A. Well, my main duty was to fly the press or take the papers off the press so they could be tied up, but also made up the wrappers and mail galleys and that's about it.

Q. Was there one particular location in which you spent more time than any other? A. Yes.

Q. What is that? A. The mail room.

Q. Under whose supervision did you work?

A. Howard Collins.

Mr. Mark: May we have a stipulation here, please, as to the position of Mr. Collins? I believe he was the circulation manager for the South Bay Daily Breeze and had supervisory duties under Section 11, Sub-section 2 of the Labor Relations Management Act.

Mr. Bakaly: May I have just a moment, Mr. Examiner. This stipulation was not discussed ahead of time.

Trial Examiner: Certainly. We will be off the record.

(Discussion off the record.)

Trial Examiner: On the record.

Let the record reflect whatever Mr. Bakaly's reac-

(Testimony of David Clark.)

tions are to the proposed stipulation with respect to this supervisory character of Mr. Collins. [9]

Mr. Bakaly: The respondent will stipulate that Mr. Collins was on December 21, 1959, prior thereto and is now a supervisor within the meaning of the Act.

Trial Examiner: Thank you.

Q. (By Mr. Mark): Dave, in the course of your employment at South Bay Daily Breeze, did you ever join a union? A. Yes.

Q. What union was that?

A. Mailers No. 9.

Q. When did you join the union?

A. Let's see. It was Tuesday. I don't know. I don't know. The 14th or 15th of December, 1959.

Q. Subsequent to joining the union, did you have any conversation with Mr. Collins regarding your joining the union?

A. Prior, is that what you said?

Q. Subsequent to joining the union. Subsequent to December 14th.

Trial Examiner: After you joined the union.

The Witness: Oh, yes.

Q. (By Mr. Mark): Do you recall when this conversation took place?

A. Well, Friday before Christmas. That's the first one. I—

Q. I think that is Friday, December 18th that you are referring to. Is that correct, Friday, December 18th? A. Yes. [10]

Q. The Friday before Christmas. Where did this conversation take place? A. In the mail room.

(Testimony of David Clark.)

Q. Do you recall what time of day?

A. It must have been around, somewhere around 4:30, I imagine.

Q. 4:30 in the afternoon or morning?

A. In the afternoon.

Q. Was there anyone present at this conversation?

A. Just Howard and myself.

Q. Howard is Howard Collins?

A. Howard Collins, yes.

Q. Could you tell us what Mr. Collins said to you?

A. Well, just, he wanted to know if I had been contacted by the union, and I told him yes that I had and he asked me, you know, that they wanted to know, you know, and I told him—they wanted to know about the paper, what the circulation was, the number of people that worked there and if the rest of the plant was union or not, and that was about it; and then we talked a little bit, and he asked me what I thought about it and I said, you know, a good deal; and he asked if I had a card, and I told him that I did not.

Q. He asked you if you had what?

A. A card, you know, union card.

Q. Your answer was— A. No. [11]

Q. As best as you can recall, is that the end of the conversation?

A. Yes. As much as I can remember. We might have said something else, a little something, but I don't—

Q. Is that the only conversation which took place with regard to the union on December 18th?

A. Yes.

Q. That is Friday? A. Yes.

(Testimony of David Clark.)

Q. Were you ever offered any other position with South Bay Daily Breeze? A. Yes.

Q. What position was that?

A. As trainee position in the circulation department.

Q. By whom were you offered this position?

A. Howard Collins.

Q. When did this offer take place?

A. Saturday. It would be December the 19th.

Q. Was that the day following your conversation?

A. Yes. The day following the conversation.

Q. Now, at this particular time, when did this offer take place? A. It was—

Mr. Bakaly: Excuse me. I think maybe counsel misspoke. In any event, I object to when the offer took place as calling [12] for a conclusion. What we are interested in is the conversation. I did not object earlier because they were foundational questions, and I think the testimony of the witness should be restricted to what was said by him and what was said by Mr. Collins.

Trial Examiner: Yes. Who said what to whom in the nearest order as you can remember, Mr. Clark.

Q. (By Mr. Mark): On Saturday, December 19th.

Trial Examiner: If there was any interchange of words, what happened?

The Witness: On Saturday?

Trial Examiner: Yes.

The Witness: Well, he just, I don't know. When I first went in to work he asked me to go across the

(Testimony of David Clark.)

street to the Spanish Inn to have a cup of coffee with him. I said, "Okay."

We went over there, and he said that he had been working on this new job for quite awhile and had finally come up, you know, come through and it was open to me.

I didn't know, he said because I have the experience, you know. He explained the job to me, what its function were and the pay, and I don't know, a few things like that, you know, and I told him I wasn't sure, you know. I would like to talk to my dad about it, but I wasn't, because, you know, the gasoline mileage and insurance, and you know, it would be pretty high. The way I explained the job, using my truck. [13]

Well, he said, "phone up your dad and he can come down and I will talk to him."

And I said—

Q. (By Mr. Mark): Well, to recap a little bit here, what was the aim of the position that you were offered?

A. Trainee is all. I don't know. Circulation trainee, I guess, that is what you call it.

Q. And you said this involved the use of your car. Do you own a truck? A. Yes.

Q. What type of truck is it?

A. It is a Ford, '57 Ford.

Q. At the time that Mr. Collins told you about the trainee job, did he tell you how much it paid?

A. Yes. He told me that it would pay—yes, $55.00 a week for—I don't know, 30 hours or something like

Q. At that time what was your pay?

(Testimony of David Clark.)

A. At the present time I was making 60.00 a week.

Q. For how many hours?

A. Four—40 and—

Q. Did Mr. Collins say that you could stay as a flyboy if you didn't accept the position?

A. No. He said that he would have to get somebody else so they could start building trainees. You know, a series of trainees, that for a person to be a trainee, they should start [14] as a flyboy and work on up to the trainee position; and that's about it.

Q. Did you subsequently call your father and inform him of this offer of the trainee position?

A. Yes, I did.

Q. To the best of your knowledge, did your father talk to Mr. Collins that day? A. Yes.

Q. Did you have any further conversation with Mr. Collins about the trainee position?

A. On Saturday?

Q. On Saturday. A. No.

Trial Examiner: The same day.

Q. (By Mr. Mark): So that your conversation ended on Saturday morning? A. Yes.

Q. Is that correct? A. Yes.

Q. Did you have any other, further conversation, regarding a trainee position on any other day?

A. Yes.

Q. When was this?

A. On Monday following the Saturday.

Q. On that day did you go to work that day? [15]

A. Yes.

(Testimony of David Clark.)

Q. Where was Mr. Collins at the time this conversation took place?

A. In his office of the Daily Breeze.

Q. Was anyone present? A. No.

Q. What time of day was that?

A. I don't know. It must have been—I don't know. Pretty close to noon or something like that. I am not real sure of the time.

Q. At that time, could you relate the conversation to us, please?

A. I was down in the mail room. I was doing some mail galley, and I was told, you know, Howard wanted to see me.

Q. Who was it that told you?

A. I don't know. It must have been Leo Gagnon or Dennis Daines. I don't remember. It was one of the two, and—

Q. Who is Leo Gagnon?

A. He is a man that works down in the circulation department.

Q. And Mr. Daines?

A. The same. He is an assistant circulation manager I think now.

Q. Did you go up to see Mr. Collins?

A. Yes.

Q. What did Mr. Collins say? [16]

A. Well, he wanted to know if I had made up my mind about the job. I told him "yes."

Mr. Bakaly: Just a minute. I am sorry, but I will have to object until we have a little more foundation as to who was present and the time.

(Testimony of David Clark.)

Mr. Mark: I think—

Trial Examiner: Well, I think probably it is not entirely clear, Mr. Mark, and also I am going to make the request, directed to you, Mr. Clark, if you will make a special effort at least on this occasion to speak perhaps a little more slowly.

The Witness: Okay.

Trial Examiner: And to be as careful as you can in trying to remember what happened and who said what to whom, including what Mr. Mark is going to ask you.

Go ahead, Mr. Mark.

Q. (By Mr. Mark): Now, this conversation between you and Mr. Collins on Monday, December 21st, at what time did this take place?

A. About 12:00 o'clock noon.

Q. Was anybody present during the course of this conversation? A. No.

Q. Where did this conversation take place?

A. In his office.

Q. At that time, what did Mr. Collins say to you?

A. Well, he asked me if I had made up my mind about the job, [17] and I told him:

"Yes. It was the same as it was Saturday. You know, I couldn't take."

Q. What did Mr. Collins say to that?

A. Well, he said that he would have to get somebody new, you know, as a flyboy so they could start training them as a flyboy and then work up as a trainee position, you know, like the new job that was offered.

(Testimony of David Clark.)

Q. Did Mr. Collins say that he had anybody in mind?

A. Yes. He said he had. I don't know two, three boys, in mind.

Q. Did you continue working that day?

A. Well, I worked for, about a half hour more. I went down and I asked him if you wanted me to stay around, you know, for the rest of the day. He said, "No, it won't be necessary;" and then I said, "do you want me to finish the mail galley," and he said, "yes. You can do that, and Leo can go down and see how you do it."

I said, "Okay."

And I finished the mail galleys and I left.

Q. In the course of this conversation, was there any mention made about the union or your union membership? This was on Monday, December 21st?

A. I don't remember exactly. I couldn't say for sure.

Q. Did you tell Mr. Collins the reasons why you couldn't [18] accept the job?

A. Yes. I told him, well, insurance for one and the gas mileage was another.

Q. What did Mr. Collins say about this?

A. Well, insurance, I don't—I don't remember him saying anything about the insurance, but on the gas mileage he said, "No. We might be able to work out gas mileage money."

And—

Mr. Bakaly: I didn't get the answer. Could I have that answer read back, please, Mr. Trial Examiner?

(Testimony of David Clark.)

Trial Examiner: Yes.

(Record read.)

Trial Examiner: Off the record.

(Discussion off the record.)

Trial Examiner: On the record.

Q. (By Mr. Mark): What did you say after Mr. Collins told you he would probably be able to work out something as far as gas mileage money?

A. I said, "Well, I still couldn't take it."

You know that was it.

Q. What did he say?

A. He says, "Well, I am sorry, you know, I hate to see you go."

Q. Did Mr. Collins at any time tell you that he was letting you go? [19]

A. Yes. He said he would have to let me go to get, bring somebody new in for—

Q. Was it at this time that you asked Mr. Collins whether it was necessary for you to stay around?

A. Yes. I asked him if he wanted me to stay around and help, you know, the new boy, if he got one in that day?

Q. And you say to the best of your recollection there was no mention about the union at this time?

A. Not that I can remember, no.

Q. Did you return to the South Bay Daily Breeze at any time after that? A. Yes, on Tuesday.

Q. Which Tuesday is this?

A. I don't know. December 22nd.

Q. Is this the day after? A. Yes.

(Testimony of David Clark.)

Q. On that day, what was the purpose of your return? A. I wanted to pick up a check.

Q. Did you see Mr. Collins on that day?

A. Yes.

Q. Did you talk to Mr. Collins on that day?

A. Yes, I did.

Q. What time were you at the Daily Breeze?

A. Roughly, around 3:00 o'clock in the afternoon.

Q. Where did you see Mr. Collins? [20]

A. In his office.

Q. Was there anybody present in the office at the time you saw him?

A. Well, I don't know. Dennis Daines—I can't be sure, but I think he was in the office for about the first minute or so. Might have just walked in and walked out.

Q. Did you have a conversation with Mr. Collins at that time. A. Yes.

Q. Could you tell that conversation, please?

A. Well, he asked me if I had changed my mind, and I told him no, and I just wanted to, you know, to get my check; you know.

He said, "We will make it up stairs, you know."

So, I said, "Okay."

So we talked there and talked awhile. I don't know what came before this. I just remember—

Trial Examiner: Let us—

Q. (By Mr. Mark): Hold it right there. Was there any mention made in this conversation about the union?

A. Yes.

(Testimony of David Clark.)

Q. Did you bring the subject up, or did Mr. Collins? A. I think Howard did.

Q. What did he say?

A. He says he thought that some day the union would come into the paper down there, but right now, he didn't feel they [21] were big enough, and he thought that he was paying his men about union scale.

Q. Was that the end of the conversation at that time, or was there anything further said about the union?

A. I don't know. This was about all that was said about the union, I think.

Q. Did Mr. Collins ask you where you had signed up with the union?

Mr. Bakaly: I object as leading, Mr. Examiner. He is asking him if he can recall anything else about the union, and he can not. This question is leading and suggestive.

Trial Examiner: Well, there comes a time when the memory is exhausted, and you have to focalize it. I am not sure that—

I will sustain it at this point, and I will ask you to have the record perfectly clear that before you spotlight the particular topic, that you make sure he can not remember anything else, Mr. Mark.

Let me ask Mr. Clark this. Right as of now, and we have a moment or two, can you remember anything else that was said by you or by Mr. Collins on this Tuesday that you were just telling us about?

The Witness: No. I can't. I can't remember anything more.

(Testimony of David Clark.)

Trial Examiner: All right, go ahead, Mr. Mark.

Mr. Mark: I would like at this time to have the reporter [22] mark for identification as General Counsel's Exhibit No. 2, an affidavit of David Clark, attested to the 24th of December, 1959, before Abraham Siegel, attorney, National Labor Relations Board.

(Thereupon, the papers above-referred to were marked General Counsel's Exhibit No. 2 for identification.)

Q. (By Mr. Mark): David, I would like to show you this.

Mr. Mark: Would you like to see this, counsel?

Mr. Bakaly: I will see it in a minute.

Q. (By Mr. Mark): I would like to show you this particular document and call your attention to Page 6 and the paragraph there and ask you to read the first paragraph.

Mr. Bakaly: To himself?

Mr. Mark: To himself.

Q. (By Mr. Mark): Now that you have refreshed your memory, do you recall if there was anything else said?

Trial Examiner: Well—

The Witness: Yes.

Trial Examiner: Excuse me. I think it would be more appropriate to have the record show first of all that you did read what Mr. Mark handed you.

The Witness: Yes.

Trial Examiner: In reading that, did that serve to help you remember something else that might have been said?

The Witness: Yes. [23]

(Testimony of David Clark.)

Trial Examiner: It did?

The Witness: Yes.

Trial Examiner: All right, tell us.

The Witness: Well, I remember now the last—he asked me where I had signed up, and he asked me if I had signed up at the press or not, and I told him no. It was at the house.

Q. (By Mr. Mark): At the where?

A. At my house.

Q. No. He asked you where you had—whether you had signed up where? A. At the plant.

Q. At the plant. All right.

Mr. Mark: Might I just have a few minutes, Mr. Trial Examiner.

Trial Examiner: All right. We will take a brief recess before going on.

(Short recess.)

Trial Examiner: On the record.

Mr. Mark: May the record reflect that during the recess, respondent's counsel requested, and the General Counsel provided the statement which was shown to Mr. Clark as General Counsel's Exhibit No. 2.

Trial Examiner: Very well.

Mr. Mark: I have no further questions.

Cross-Examination [24]

Q. (By Mr. Bakaly): Mr. Clark, you have been shown General Counsel's Exhibit No. 2 which is a statement that was made by you to the representative of the National Labor Relations Board on the 24th of December, 1959.

Have you made any other statements, written state-

(Testimony of David Clark.)

ments, to representatives of the National Labor Relations Board? A. Yes.

Mr. Bakaly: At this time, Mr. Examiner, I request that the General Counsel be instructed to make available to the respondent, all statements made by this witness to a representative of the National Labor Relations Board, and I request a recess in which to examine them. I have almost completed examining this one in the last recess.

Trial Examiner: Are the other ones very long?

Mr. Mark: No. The other ones—there is a total of five pages.

Trial Examiner: Well, I think that is fair enough. We will take a brief recess.

Mr. Mark: General Counsel has no objection.

(Short recess.)

Trial Examiner: On the record.

Q. (By Mr. Bakaly): Mr. Clark, I believe you testified on your direct examination to a conversation on December 18, 1959, with Mr. Collins, is that correct?

A. That is the Friday. Would that be it? [25]

Q. Yes, that was Friday.

A. Yes, that is right.

Q. During that conversation, I believe you testified that you told him that you had joined the union?

A. No. He asked me if I had been contacted by the union, and I didn't testify that I joined the union. He asked me—

Q. What did you tell him?

A. He asked me if I had the card and I said no. [26]

(Testimony of David Clark.)

Q. Did you tell him that you had joined the union?

A. No.

Q. I show you General Counsel's Exhibit 2 on page 2, about the 10th or 11th line and ask you to read that whole paragraph if you will to yourself.

Trial Examiner: That has been marked, but it has not been offered as yet as I recall.

Mr. Mark: That is right.

Mr. Bakaly: That is right.

The Witness: When I says, "Well, what do you think of it—"

Trial Examiner: Excuse me. All that Mr. Bakaly asked you is to read it.

The Witness: Okay.

Trial Examiner: Now, have you read it, Mr. Clark?

The Witness: Yes. I read it.

Q. (By Mr. Bakaly): Does it refresh your recollection that on the statement you stated that during the conversation of December 18th, you told Mr. Collins that you had joined the union? A. No.

Mr. Mark: I'm going to have to object. Mr. Clark has already testified both in answer to Mr. Bakaly's question and originally in his testimony that he said that he had gotten a card, and now I think the question is improperly phrased [27] to mean—

Mr. Bakaly: This is the cross-examination, Counsel.

Trial Examiner: If it does not refresh his recollection, it doesn't, Mr. Mark. That is about where we stand at this point, and he said it doesn't, so we will go on from there.

Mr. Bakaly: I would like to read into the record, if I might, the paragraph.

(Testimony of David Clark.)

Trial Examiner: Is this being offered for impeachment?

Mr. Bakaly: Yes.

Trial Examiner: Rather than offering it—

Mr. Bakaly: I don't see any need to offer the whole thing.

"On or about December 18, 1959, Collins asked me if the union had approached me. I replied that it had. Collins asked, 'What did they ask you?' and I told him the union man had asked what the paper's circulation was and whether the plant was union. Collins then asked, 'Well, what do you think of it?' and I replied that I had joined. Collins then asked whether I had card, and I told him that I did not need it. This conversation took place in the mailroom about 5:00 p.m., quitting time."

Q. (By Mr. Bakaly): Now, I show you, and I would like to have marked as Respondent's 1 for identification a statement dated December 24, 1959, which has previously been handed to me by the General Counsel. This is a copy. [28-29]

What is your pleasure, Mr. Examiner? Do you want the original?

Trial Examiner: The copy is all right if it is legible.

Mr. Bakaly: It is legible, but I would like it back. That is the only copy I have. Do you have an extra copy?

Mr. Mark: I can supply extra copies.

(Thereupon the document above referred to was marked Respondent's Exhibit 1 for identification.)

Q. (By Mr. Bakaly): Now, I show you, Respond-

(Testimony of David Clark.)

ent's 1, and ask you if this is a statement made by you on or about—I was in error, on or about the 22nd day of January, 1960, to a representative of the National Labor Relations Board?

A. Yes, that is right. I did not tell him that I joined.

Q. I'm just asking you if this is the statement, a copy of the statement that you gave to the Board?

A. That is right, yes.

Q. Now, I would like—

Trial Examiner: Is your signature on that, Mr. Clark?

The Witness: I think it is.

Q. (By Mr. Bakaly): Is that your signature, Mr. Clark? A. Yes.

Q. According to the signature page, page 2?

A. Yes, that is right.

Mr. Bakaly: I would like to read the first part of the second paragraph of this affidavit, Mr. Examiner. [30]

Trial Examiner: I think there may be a little question in the record. Mr. Clark indicated possibly from his statement that he did not say something in there, so I think we ought to make sure.

Mr. Bakaly: Well, I'm reading the same thing. I think I am going to read this paragraph, the second paragraph, and that is what he was referring to, wasn't it, Mr. Clark?

Trial Examiner: Is that a statement that you made on that date, Mr. Clark?

The Witness: Yes, yes.

(Testimony of David Clark.)

Q. (By Mr. Bakaly): It is?

A. Yes, sir. I said all the statements I made were like that.

Q. "During my conversation with Mr. Collins on or about December 18, 1959, I did not tell him I had joined the union. He asked me what I thought about the union and I said I thought it was a pretty good deal. He asked whether I had my card yet and I replied 'no.' He did not ask me whether I had joined nor did he ask to see my card."

Q. (By Mr. Bakaly): Now, isn't it true, Mr. Clark, that on one occasion you stated that you told Mr. Collins that you had joined the union, and on another occasion you told him that—you told the National Labor Relations Board that you did not tell him that you had joined the union; and isn't it the truth that you really don't remember what you said to him [31] on December 18?

A. I remember it, as a pretty good deal, I asked him the one that said I did, the question before it says, he asked me what I thought. Isn't that what it says, that one?

Q. That is right.

A. And it says well I joined—well, I said I thought it was a pretty good deal. That's what I said.

Q. I don't believe you have answered the question.

Trial Examiner: I think it is a compound question. Would you break it up, Mr. Bakaly?

Q. (By Mr. Bakaly): The record shows that in General Counsel's Exhibit No. 2, you stated that you told Collins that you had joined the union on Decmeber

(Testimony of David Clark.)

18; and in Respondent's Exhibit 1, a second statement made to the Board, you told the Board that you did not tell Collins that you had joined the union.

Isn't it true that you don't remember now exactly what you told Collins on or about December 18?

A. Yes, I remember.

Q. When were you first associated with the Daily Breeze, Mr. Clark?

A. It was July 4, 1958, I believe.

Q. Prior to that time, were you not a carrier?

A. That is right, yes.

Q. You were associated with the Daily Breeze at that time, [32] were you not?

A. Oh, yes, yes.

Q. When did your association as a carrier begin?

A. I don't know. It must have been 1955 or '56. I don't—maybe earlier than that.

Q. About—

A. It could have been '54. I don't know.

Q. About five or six years?

A. Yes. I don't—

Q. Who employed you or who got you the job as a carrier? A. Howard signed me up.

Trial Examiner: That is Mr. Collins?.

The Witness: Mr. Collins.

Q. (By Mr. Bakaly): And you were employed as a carrier until sometime in 1958, July of 1958 I believe you testified to?

A. No. I, I quit my route before that. I didn't have a route for a while.

(Testimony of David Clark.)

Q. You had no association with the paper?

A. Yes.

Q. For a while? A. Yes.

Q. For about how long didn't you have any association?

A. I would say for about a year. Maybe. I don't know exactly. I don't remember exactly.

Q. While you were a carrier, you were nominated and made [33] Carrier of the Year by Mr. Collins?

A. Yes.

Q. Now, your employment as a fly boy during the period of July, 1958, to December 21, 1959, was at what rate per hour?

A. Well, when I first started—do you want the first?

Q. Yes.

A. It was $1.00 an hour.

Q. All right.

A. And then it went to, I think it was—I don't know, either $1.20 or $1.25 or $1.15, something like that; and then it went up to $1.50, and that was the final.

Q. When did it go up to $1.15, if you recall?

A. Well, it was when Jack Hancey was circulation manager.

Q. When Mr. Collins became circulation manager, was it a $1.25? Did he raise you to $1.25?

A. No. I don't know whether it was up to $1.15 or $1.25, either.

Q. It is not important. Anyway it was up to $1.50 for sometime prior to December of 1959?

(Testimony of David Clark.)

A. Yes.

Q. Isn't it true that the hours that you worked a day varied? A. Yes, they did.

Q. Isn't it true that the hours that you worked per hour varied?

A. Oh, yes. They would vary, yes. [34]

Q. They would vary. You might work as little as 35 hours a week or 36 hours a week?

A. Or I might work 45.

Q. Answer my question. I will get to that, don't worry. I am not trying to trick you or anything. I just want the answer to the question.

A. That is right. They would vary, yes.

Q. You might work as little as 35 hours—

A. Yes.

Q. —or 33 hours, is that right?

A. I don't know. 33 is getting sort of low.

Q. 35 to 45? A. Yes.

Q. You might work as much as 40?

A. I worked more.

Q. You might work as much as 40?

A. Yes.

Q. So that the statement that you had made on direct examination that you worked the 40 hours is not exactly correct?

A. Well, that is what I would put—

Q. Just answer the question and then you can explain. I want that answer to the question.

It is not exactly correct, is it?

A. No. Well, what do you mean by exactly? Did I work that [35] all the time?

(Testimony of David Clark.)

Trial Examiner: I don't think it adds anything, Mr. Bakaly. The record reflects what the situation was.

Q. (By Mr. Bakaly): I take it you have known Mr. Collins since sometime in 1954; about six years?

A. Yes.

Q. You refer to him as Howard? You have throughout this proceeding? A. Yes.

Q. Your relationship with him was a friendly one?

A. Yes.

Q. Was it not? A. Yes.

Q. It was more than a relationship of a normal relationship of a supervisor or an employer and employee, isn't that eorrect?

A. Yes, I would say so.

Q. Mr. Collins throughout the period of your acquaintanceship took an interest in your education, is that correct?

A. Oh, he talked to me about it, yes.

Q. He was interested in having you remain in school? A. Oh, yes.

Q. Is that correct?

A. That's what he said, yes.

Q. You were in school during the period of say July 19 [36] through December 21, 1959, were you not? A. Yes.

Q. Where were you in school?

A. El Camino Junior College.

Q. You were taking a full college course?

A. Yes. I was taking it full time.

Q. So that your employment at the Daily Breeze during that period of time was an extra employment

(Testimony of David Clark.)

other than your main occupation which was as a student, isn't that correct? A. Yes.

Q. Now, you believed that Mr. Collins was interested in your future, did you not?

A. No. I know he was interested in my schooling. He talked to me about it.

Q. He was a good friend? A. Yes.

Q. He wouldn't do anything to hurt you as far as you believe, is that correct?

Mr. Mark: I object to that.

Trial Examiner: Sustained.

Q. (By Mr. Bakaly): In December, 1959, you desired to remain in school, did you not? A. Yes.

Q. So you didn't want a full time employment?

A. No. [37]

Mr. Mark: I object to that. I'm afraid that Mr. Bakaly is going into matters, going far beyond what I think is the scope of direct examination; and if he wants to make this witness his own, he can.

Mr. Bakaly: Well, this is the charging party, and I will call the witness under 43 B if that will make you any happier, but it won't change my examination one bit.

Trial Examiner: I think the only possible vice in a question that suggests itself to me is that going to school wouldn't necessarily rule out full-time employment, and I think the fact that he is going to school and the hours worked would be all that we could develop, because a person might adopt a different conclusion as to whether it was fulltime or not.

Mr. Bakaly: I will develop it another way.

(Testimony of David Clark.)

Trial Examiner: All right, Mr. Bakaly.

Q. (By Mr. Bakaly): In December, 1959, I believe that you testified, you were carrying a full load as a student?

A. Yes, full-time student.

Q. Full-time student? A. Yes.

Q. You were also employed at the Daily Breeze during that period of time? A. Yes, that's right.

Q. Isn't it correct to say that in December and November [38] of 1959, you were interested in working less hours for as much money as you possibly could so that you would have time to go to school and other activities, isn't that correct?

A. No. I wouldn't say that. I was, the main thing I was interested in was cutting down on my Saturday nights.

Q. Cutting down on your Saturday nights?

A. Yes, too many hours.

Q. Too many hours?

A. Yes.

Q. You wanted time to have some recreation on Saturday nights?

A. Not so much as making a seven-day week of work, I mean.

Q. And that was too much with your school work?

A. I would say that it was, yes.

Q. You wanted time to study and so forth?

A. I would.

Q. You were willing to work fewer hours for more money, isn't that correct? A. No.

Q. In November and December of 1959?

(Testimony of David Clark.)

A. What do you mean by fewer hours?

Q. Fewer hours than you had been working?

A. If I could say, cut down from 14 maybe to 8, but the daily work—I mean it was good. I liked the hours. I could go to school in the morning, work in the afternoon, and leave [39] my nights to study. That was fine. That is what I wanted like that.

Q. And you wanted to have your Saturdays free, and so you wanted fewer hours on Saturday, is that correct?

A. I wouldn't say I wanted it free.

Q. You didn't want to work 8 hours or more on Saturday?

A. Yes. I didn't want to work so many hours.

Q. Mr. Collins was the supervisor of the circulation department at the Daily Breeze, isn't that correct?

A. Circulation manager, yes, the same thing.

Q. Under his authority were several people. Would you tell us who reported to Mr. Collins?

A. Well, there is, I don't know. Dennis Daines and Leo Gagnon—

Q. You don't have to name them. Just the number and what they did. I'm not interested in the names.

A. They were all district men or worked in the mail room, part district and part mail room. There was, I don't know. There must have been about, I don't know, six. I don't know. Six or seven full time.

Q. They were all district managers, were they not?

A. Well, yes. Well, they did mail room work, too.

Mr. Bakaly: I move to strike that comment, Mr.

(Testimony of David Clark.)

Examiner. I will get what he means about mail room work in a minute. [40]

Trial Examiner: The question—

Mr. Bakaly: That was not responsive.

Trial Examiner: The question is whether they were all district managers. Is that the question?

Mr. Bakaly: Yes.

Trial Examiner: Were they, Mr. Clark?

The Witness: By title, yes. I mean what you would call them by title district managers, except, well, Dennis Daines. The last part I worked there, they didn't have a route or something. I don't know. So, he was just a—

Trial Examiner: May I just ask two or three questions here.

District managers would be individuals that had under or were responsible for the circulation of newspapers in a particular district?

The Witness: Yes.

Trial Examiner: Of an area?

The Witness: That is right.

Trial Examiner: And a district manager had personnel or boys that would actually make the deliveries of the papers?

The Witness: That is right.

Trial Examiner: The district manager oversaw that they got their papers and got the money from them that they collected and turned that in? Would that be a general [41] description?

The Witness: Yes.

(Testimony of David Clark.)

Trial Examiner: All right. Now, were you going into the mailer aspect?

Mr. Bakaly: Yes. I'm going to go into his duties.

Q. (By Mr. Bakaly): You stated on direct examination that you were the fly boy?

A. That is right.

Q. It was your duty to fly the press?

A. Yes.

Q. Isn't it true that it was your duty to take the papers off of a conveyor belt many, many feet removed from the press? A. Yes.

Q. So that your duties were really not what is known as flying a press?

A. Well, that is what you call it. It is flying a press. That's what you are doing.

Q. You worked on the taking them off of the press? You were taking them off a conveyor three or four rooms apart from the press room?

A. Well, flying a conveyor.

Q. Isn't that correct?

A. Yes, that's right.

Q. What other duties did you have besides taking the papers [42] off of the conveyor belt?

A. Well, I would, we had wrappers. I would make up, I would make up—well, I would make up wrappers and I would do the mail galleys.

Q. About how many mail galleys would there be?

A. I don't know, 250-275.

Trial Examiner: What is a mail galley, Mr. Clark?

The Witness: Well, it is like the newspapers and mailed out to various cities, you know, that aren't de-

(Testimony of David Clark.)

livered to by the carrier. They are just a piece of paper. You roll the paper up and mail them to the post office.

Trial Examiner: Does wrapping contemplate that they are going to protect the papers from wet weather; is that the purpose?

The Witness: No. It just keeps them in. I don't know, a little compact area. Don't have them flat so they get all wrinkled up.

Trial Examiner: Is the wrapping done in conjunction with putting it or preparing papers for mailing when you mentioned that you did wrapping?

The Witness: I don't wrap them. I just put the names on the mail slips of paper that the papers are wrapped up into.

Trial Examiner: But you didn't do the wrapping?

The Witness: Well, once in awhile, but not very often. [43]

Q. (By Mr. Bakaly): So you prepared the galleys for 250 papers? A. Yes.

Q. There weren't 250 galleys?

A. Yes. There are 250 galleys.

Q. A galley for each name, is that what you mean?

A. Yes.

Q. Now, did the district managers take the papers and arrange them for their carriers? You didn't have anything to do with that?

A. What do you mean arrange?

Q. They took the papers and organized them for distribution to their particular carriers, and they put them into bundles and so forth? You didn't do that?

(Testimony of David Clark.)

A. Well, I stacked them up, yes. I mean—

Q. You stacked them up for, so many for a certain district manager and so many—

A. No, not in that way, not on the dot.

Q. Not on the dot? A. No.

Q. You didn't do that? A. No.

Q. Have you told us all of your duties?

A. Well, I, on Saturdays and Sundays, I would count out comics and magazines, and well, even on those days, I would [44] stack for the district managers.

Now, I mean I would stack them on the dot, so many for such and such on Saturdays and Sundays I did.

Q. Now, there were about 7 district managers?

A. Yes.

Q. Full time? A. Full time.

Q. You were classified as a part-time employee?

A. Yes. That's what I was classified as, yes.

Q. You were a part-time employee, isn't that correct?

A. Well, what do you consider a part-time; less than 40 hours?

Trial Examiner: I think the record will request what hours he worked. His characterization wouldn't help, I don't believe.

Mr. Bakaly: Very well, Mr. Examiner.

Q. (By Mr. Bakaly): The Daily Breeze didn't always have full time district managers, did they?

A. No. When I first started working, they had very few.

(Testimony of David Clark.)

Q. In May or June of 1959 or prior thereto, the great majority of the district managers were part-time district managers, isn't that true? A. Oh, yes.

Q. Men who had jobs elsewhere for full time such as at an aircraft factory? [45]

A. Yes.

Q. Is that right? A. That is right.

Q. Isn't it true that there was a lot of turnover of the district managers; they changed often?

A. Yes, quite a bit.

Q. And that there was a considerable—each time a new district manager came in, there was considerable confusion about him learning the job of that district and learning what to do and so forth, isn't that true?

A. Yes.

Q. So that to alleviate this, full-time district managers were employed in June or so of 1959, is that right?

Mr. Mark: I object to that. That calls for a conclusion. I don't think that is properly within the knowledge of the witness;

Mr. Bakaly: Very well. I will delete to "alleviate." The objection is well taken.

Q. (By Mr. Bakaly): I will ask you if it isn't a fact that in June or July of 1959, full-time district managers were employed by the Daily Breeze?

A. Well, they had full-time before then.

Q. All district managers were full time in June or July of 1959? A. Not all.

Q. How many part-time district managers were there? [46]

(Testimony of David Clark.)

A. Let's see. June. There was, I was graduated after that—I think there was about 4, 4 or 5, because, well, we had 11 districts. I remember that, and, well, even if you figure 7 full-time men, 1 guy not running a route, that leaves 5 part-time men right there.

Q. When the full-time men were put on, the number of districts were cut down, were they not, and each district was enlarged; so that in 1959, in June or July, there were 7 or 8 districts, isn't that correct?

A. I don't think so.

Q. You don't think so?

A. I think there were 11.

Q. Very well. I will get it from Mr. Collins.

However, even after most of the district managers were full-time, there was still some turnover of district managers, isn't that true?

A. Yes. There were quite a few for full-time.

Q. There was still confusion whenever a district manager would have to be hired because he didn't know anything about the business or the route, isn't that correct? A. That is correct.

Trial Examiner: Mr. Bakaly, it occurs to me that we perhaps may be getting into a situation of your case which will probably be put on through independent testimony. Anyway, this is being taken in rather an indecisive way to this [47] witness. I am thinking of the decisions and the management changes and reasons for them.

Mr. Bakaly: I just want to make sure this witness had knowledge of all of them, and I am about through with that area anyway. You are absolutely correct.

(Testimony of David Clark.)

This is certainly part of our case, but I'm about through with that.

Trial Examiner: All right.

Q. (By Mr. Bakaly): Now, in the fall of 1959 and by fall I mean September or October or November of 1959, isn't it true that you had a conversation or series of conversations with Mr. Collins concerning this problem of the confusion that would arise when a district manager quit or was sick and there was nobody trained to take his place?

A. I don't know. He might have said something about not being able to get good help.

Q. That is right.

A. But that is about all.

Q. Didn't you in the fall of 1959, after you had purchased a pick-up truck, offer to help out the district managers on occasion?

A. Well, yes, one John Byers.

Q. The answer to the question is yes.

A. Do you mean help?

Q. Help out the district managers? [48]

A. No, not managers.

Q. One manager?

A. One manager, yes.

Q. Did you help out a district manager on occasion? A. For about three weeks.

Q. And you delivered papers in your truck for him, is that correct?

A. Yes. Right by my house. I just dropped them off. The carriers lived right off the same block as I did, and it was not out of my way or nothing.

(Testimony of David Clark.)

Q. Well, didn't you use your truck on behalf of the company then in some other respect during the fall or so in 1959?

A. One—I think once, one Saturday I run a route for Jim Erickson; but after I told him, I told Dennis even after that, that I couldn't. I couldn't do it anymore because of insurance. I told him that after John Byers.

Q. You did do it on occasion, however?

A. That was the last time, yes.

Q. When you did that, weren't you reimbursed by the company telling you to stock up some extra hours on your payroll, and they would pay you for the gas mileage during that time?

A. Once, two times; about four times I did it, two times I got paid.

Q. Extra hours, you mean?

A. Yes. One time I got—yes. Those were extra hours. [49]

Q. And this was because the rest of the district managers were getting so many cents per mile, isn't that true?

A. And he said he couldn't get mileage for me.

Q. But you knew at that time in November and December and October of 1959, that the district managers were getting paid certain cents per mile, approximately 8 cents per mile, isn't that correct?

A. Yes. I don't know the exact rate.

Q. You knew they were getting money to compensate them for the gas mileage and the depreciation of their automobiles, isn't that true?

(Testimony of David Clark.)

A. I knew they were getting money, but it wasn't paying for the—

Q. Answer my question. You knew they were getting money? A. That's right.

Q. Isn't it a fact that that was more than paying for it?

A. No. I have never met one person down there—

Trial Examiner: I think this would be very unproductive at this stage.

Mr. Bakaly: Very well.

Q. (By Mr. Bakaly): During the fall of 1959, in these off-hand, casual conversations that you had with Howard, did you ever have a conversation in which it was discussed that you might become a part-time district manager on a trainee basis of some kind? [50]

A. No.

Q. You don't recall any such conversation?

You were the only full-time employee that spent the majority of his time in the mail room, isn't that correct? A. Let me see. Yes.

Q. Isn't it true that the other employees, the press men, the stereotypers, and so forth, gathered in the mail room occasionally to eat lunch and so forth?

A. Yes. They eat their lunch there sometimes.

Q. All the employees did and Mr. Collins would be in there on occasion?

A. Yes. That is the only place they had to eat, actually.

Q. Lots of talk about union during lunch and so forth, wasn't there, as a casual nature?

(Testimony of David Clark.)

Mr. Mark: I really don't see—well, never mind. I will withdraw the objection.

The Witness: Of a casual nature?

Q. (By Mr. Bakaly): Yes. All the men would talk at various times about their particular union or some other union or the union movement in general or the—

A. Well, I never ate lunch with them, see.

Q. You didn't eat lunch with them, but you were there working right next to where they were eating lunch?

A. Sometimes, yes.

Q. Did you ever hear of any conversations about union? [51]

A. I heard union talk from everybody there.

Q. It was free and easy around the plant, isn't that correct?

A. Even in circulation I heard union talk.

Q. Surely. A. Okay.

Q. We agree on something here.

Now, on the 19th of December, that was the Saturday that you had a conversation with Mr. Collins, isn't that correct? A. That is right.

Q. Mr. Gagnon was also present at that conversation, isn't that correct? A. That is right.

Q. At that conversation he told you that he had finally gotten approval of a job as a circulation trainee?

A. That's right.

Q. Isn't that correct? A. Yes.

Q. He used the words, he finally got the approval, isn't that correct?

(Testimony of David Clark.)

A. Yes. He said he finally got the approval.

Q. Does that refresh your recollection that you and he had discussed the trainee position previously?

A. That was the first I had ever heard of the trainee position.

Q. Mr. Collins stated on that occasion that the first step [52] of this training program was the fly boy job, isn't that correct? A. That's right.

Q. And that you were qualified for the trainee position because of the fact that you had been a fly boy for some time because of the fact that you had assisted other district managers on occasion, isn't that correct?

A. That is right.

Q. And also because he liked you and liked your work and he wanted to give you this opportunity, isn't that correct? Did he say that or words to that effect?

A. I guess. I don't remember as far back. He could have. I—

Q. Now, he stated that the pay would be, I believe you testified $55.00 a week for approximately 33 hours, is that correct?

A. I don't remember the exact.

Q. It was suggested that it would be about $1.67 an hour?

A. He didn't say the hours. He took my average and I don't know. He didn't say the hours. He said it would be $55.00 a week. That was about it.

Q. It might be more than that if you worked 33 hours though, isn't that correct?

A. I never heard anything about that.

(Testimony of David Clark.)

Q. Didn't he tell you that it might be possible to work [53] 33 hours or 35 hours on occasion?

A. Not that I know.

Trial Examiner: Excuse me, Mr. Bakaly, I thought we might get it in now. I didn't want to interrupt your cross-examination, but it is on the same subject.

As I recall, there was some reference to working a 30 hour week in connection with this trainee program when you were answering questions that Mr. Mark asked you. You remember that?

The Witness: I said either 30—I didn't remember the exact amount of hours. I said it was either 30 or 33. I didn't remember the exact amount of hours that it was.

Trial Examiner: Do you remember what you said, and I may be wrong, too—this morning here in connection with how many hours this trainee job would take?

The Witness: It was less than what it was, than it was before, what I was working before. That's all I remember saying now. I don't—

Trial Examiner: All right, sir. Go ahead, Mr. Bakaly.

Q. (By Mr. Bakaly): I believe you testified that at this conversation on the 19th of December, you stated that one of the reasons you didn't want the job was because your car insurance would be increased, is that correct?

A. Car insurance and gas mileage.

Q. And gas mileage would be increased? [54]

A. Yes.

(Testimony of David Clark.)

Q. Putting that aside and assuming for the moment, and it is only an assumption, that the gas mileage and your car insurance would not be increased, you realized on December 19th, that this new job of the trainee was a better job in terms of pay and work for you, isn't that correct?

A. Putting aside gas mileage?

Q. Gas mileage and car insurance, putting that aside?

A. It would have been a better work?

Q. It would have been a better job? There would have been more money, isn't that correct?

A. Well—let's—I was making—

Q. Putting aside the gas mileage and insurance?

A. Do you mean more money for less hours?

Q. That is right.

A. It would have been less money. It would have been actually less money than that I was working, making before.

Q. On an hourly basis it would have been more?

A. On an hourly basis, yes.

Q. You don't really know whether it would have been more money or not because it would have been less money, because your hours as a fly boy fluctuated and so forth, so that on many weeks this $55.00 would have been more than what you had previously made, isn't that correct, even on a weekly basis?

A. It would be. I don't know. [55]

Q. It could be?

A. I mean I don't know. I just—

Q. Well, I just want to make sure your $60.00 is

(Testimony of David Clark.)

not the amount of money that you received every week as a fly boy? Some weeks you received less and—some weeks you received less than $55.00, isn't that right? A. No. See—

Q. As a fly boy?

A. That's what I'm talking about.

Trial Examiner: Just on this general theme, did you receive, say, during 1959, less than $50.00 a week as a fly boy?

The Witness: During '59?

Trial Examiner: Yes.

The Witness: I probably did because of—

Trial Examiner: On any week?

The Witness: Because some, during some of 1959, I was making $1.50 an hour.

Q. (By Mr. Bakaly): When you were making $1.50 an hour?

A. When I was making $1.50 an hour?

Q. Yes. A. No. Less than 50.

Trial Examiner: I think that was—

Q. (By Mr. Bakaly): Less than 55 is my question?

Trial Examiner: Less than 55 was your question. I [56] meant 55, sorry.

The Witness: I don't think I made less than 55, because some weeks I would work over 40 hours.

Q. (By Mr. Bakaly): I'm not talking about that. I'm talking about the weeks when you, some weeks you would have made less than 55, isn't that correct?

A. Yes. The hours I worked the overtime I would put back onto the hours that I worked less.

(Testimony of David Clark.)

Trial Examiner: Are you stating that you are averaging it out, Mr. Clark?

I think what we are directing attention is just a pay check for a particular week. Now, it may average considerably more than 55, but the question just goes to the narrow point as to whether in some weeks you received less than $55.00 when you were getting $1.50 an hour?

The Witness: No.

Trial Examiner: All right.

The Witness: I mean I wouldn't say definitely, but I might have made 50. I don't think I made less than 55.

Trial Examiner: That is your best recollection?

The Witness: Yes.

Q. (By Mr. Bakaly): But in any event, in your conversation on December 19th, putting aside the cost of insurance and gas mileage, you didn't make any objection to Mr. Collins concerning the amount of pay in the new job? [57]

A. No.

Q. And your answer is you did not make any objection?

A. I did not make any objection to the amount of pay, I mean.

Q. Isn't it true that during that conversaion, you knew that you would be paid a certain amount of cents per hour for the gas mileage in this new job?

A. During this conversation it wasn't mentioned.

Q. I asked you if you knew at that time that you would be paid the gas mileage? A. No, I didn't.

(Testimony of David Clark.)

Q. You did not know? A. No.

Trial Examiner: Did you know what the other people were getting?

The Witness: I didn't know the exact. I knew they were getting money.

Trial Examiner: You knew that everybody that was doing that kind of work got gas mileage or reimbursement?

The Witness: That is right.

Trial Examiner: All the district managers used their own vehicles?

The Witness: No.

Trial Examiner: Did some of them?

The Witness: Some of them. Breeze had two trucks of [58] their own, and they don't get reimbursed for their gas mileage.

Trial Examiner: Yes.

Q. (By Mr. Bakaly): Now, in this conversation on the 19th of December, did Mr. Collins state that if you did not want the job, the training job, he would have to hire somebody else as a fly boy? A. Yes.

Q. So that on December 19th, you knew that if you did not take the job as the trainee, there would be, that someone else would replace you as a fly boy, isn't that correct? A. Well, on the 19th?

Q. Yes.

A. Well, I wasn't sure, but I mean just by going what he said, yes.

Q. That is what you understood?

A. Yes. That's what I understood, yes.

Q. During the conversation during the 19th, Mr.

(Testimony of David Clark.)

Clark, did you give as a reason for not taking this job the fact that you were attempting to obtain a job as a mailer in Los Angeles where you could work two shifts a week with many less hours and make more money than you were making at the Daily Breeze?

A. No. On Monday I said that.

Q. You made no such statement on the 19th?

A. On Saturday, no. [59]

Q. On Saturday the 19th did you complain about having to leave your fly boy's job if you didn't take the training job?

A. Did I complain?

Q. Did you complain? Did you make any statement that that was not fair, that that was wrong or anything like that?

A. No. I just said that I would like to keep my job, the one I had.

Q. You said that on the 19th?

A. On the 19th.

Q. Now, did you have a conversation with your father on the 19th? A. I phoned him.

Q. Concerning this job opportunity?

A. I didn't have a conversation. I just phone him up and told him, that, you know, how I wanted to see him about another job, but that was the extent.

Q. That was what you said?

A. That was the extent of the conversation.

Mr. Bakaly: I am going into a new conversation on the 21st, Mr. Examiner. What is the Examiner's pleasure of breaking for lunch. It is immaterial to me.

(Testimony of David Clark.)

Trial Examiner: Off the record.

(Discussion off the record.)

Trial Examiner: On the record.

Q. (By Mr. Bakaly): Mr. Clark, just before the recess, you [60] told us that on December 19th, you told Mr. Collins that you wanted to keep your job as fly boy? A. That's right.

Q. Did you ever tell any representative of the National Labor Relations Board that you said that in the course of your conversation on December 19th?

A. I don't know. I don't, I don't know.

Mr. Bakaly: I would like to have a stipulation that the statements presented by the General Counsel did not recite any statement by Mr. Clark that wherein he told Mr. Collins on December 19th that he wanted to keep his fly boy job.

Mr. Mark: Well, we haven't actually offered any statements.

Mr. Bakaly: I will now offer—

Mr. Mark: I'd just as soon state it in the affidavit that we have procured in the investigation, that there does not appear any mention of this particular statement.

Trial Examiner: That is, the proffered stipulation went to that it doesn't appear in any.

Mr. Bakaly: It is just the form of impeachment by a negative kind of impeachment.

Trial Examiner: Well, it is subject to being argued of what the—

Mr. Bakaly: That is right.

(Testimony of David Clark.)

Trial Examiner: But there's no question, I take it, as [61] to the fact that it does not appear.

Mr. Mark: No, there is no question.

Trial Examiner: All right.

Q. (By Mr. Bakaly): And your testimony is that you don't recall whether or not you made this statement to the Board that you told Mr. Collins on the 19th that you wanted to keep your job?

A. Well, he said I didn't, I must have not. I don't remember it, no.

Trial Examiner: I am going to ask you again, Mr. Clark, to make a very, very serious effort to go slower.

The Witness: Okay.

Q. (By Mr. Bakaly): Isn't it true, Mr. Clark, that you are not sure that you made such a statement to Mr. Collins on the 19th of December?

A. Yes. I am sure because—well, when I joined the union, just, they said in case, you know, if anything did come up, that, you know, in case they wanted to get rid of me, you know, because I joined the union, you know, to tell them, you know, if, see if I could keep my same job. That's what he told me, you know.

Trial Examiner: Does this go to the 19th when you were talking to Mr. Collins?

The Witness: Yes.

Trial Examiner: Do you say you are sure about what Mr. [62] —Mr. Clark, I am not certain what you are sure about?

The Witness: Well, when the union representatives came over to my home and signed me up, you know—

Trial Examiner: I realize the background, but the

(Testimony of David Clark.)

narrow problem we are now dealing with is whether or not you are sure on the 19th of December, 1959, you told Mr. Collins that you wanted to keep your job as fly boy?

The Witness: I am pretty sure. I am—okay, I am sure.

Trial Examiner: All right.

Q. (By Mr. Bakaly): December 19th was the first time that you had been offered this job as trainee, isn't that correct? A. Yes, it is.

Q. You had discussed with representatives of the union then that job? A. Not that job, no.

Q. Did you have a conversation with Mr. Collins on the 21st? A. Yes.

Q. I believe you testified on direct examination that only Mr. Collins was present, is that correct?

A. As far as I can recall, yes.

Q. Isn't it true that Mr. Gagnon was present at that conversation?

A. If he was, he wasn't there at the end of the conversation.

Q. He was not? A. No.

Q. Didn't you testify that Mr. Gagnon and you went down to [63] the mail room at the end of that conversation?

A. Yes, because Howard called him in, I remember, at the last, so he would go down and I could show him how I did the mail galleys.

Q. He called him in?

A. Yes. I am positive of that.

(Testimony of David Clark.)

Q. Now, were the advantages of this training job related or stated to you by Mr. Collins again on the 21st?

A. He asked me if I had made up my mind about the job.

Q. Didn't he also again tell you that it would be a good opportunity for you to take the training job?

A. I don't remember that. He might have something to that effect, but I don't remember it.

Q. That it would enable you to stay in school? Did he mention anything along that line?

A. I think he said that he wanted to make sure that I stayed in school, you know.

Q. That this would be a job of less hours for the same or more pay? Did he say words to that effect?

A. I don't remember him. He—

Q. In this conversation, did you tell Mr. Collins that you would definitely not take the training job?

A. Yes.

Q. Dropping back a minute to the conversation on the 19th, at the end of that conversation, did you state, did you not, [64] that you wanted to talk it over with your father? A. That is right.

Q. So on the 21st, now, isn't it true, that you stated that the reason that you did not want to take the training job, was because you would rather go to Los Angeles and work as a mailer where you would work two shifts a week and earn less money?

A. No, because the way that come out, Howard asked me—well, what are you going to do now, you know, for money and a job.

I told him, well, I'm not sure, but I think I would

(Testimony of David Clark.)

maybe get a job somewhere as a mailer and just work a couple of days a week, you know, and—

Q. You didn't have any job arranged or you hadn't thought about a job in Los Angeles on the 21st?

A. Well, I couldn't have, because when I joined the union, I signed this—I don't know, paper or binding deal, stating that when I joined the union, I would have to stay at the Breeze until it was organized or some agreement was reached, unless I was fired.

Q. Is it your testimony that you did not state on the 21st that you could get a job in Los Angeles as a mailer?

A. No. I said I might be able to.

Q. Isn't it true that you went on to work on the evening of the 21st at Pacific Press as a mailer? [65]

A. That is right.

Q. That you worked there off and on as a part-time mailer ever since?

A. Yes, there and the Examiner. I work off and on.

Q. Is it your testimony that you had made no previous arrangement prior to December 21st to get that work?

A. That's right. I had never even heard of the Pacific Press until—

Q. Your father had, hadn't he?

A. Probably, but I never mentioned—

Q. Isn't he employed by a printing press company in town?

A. Well, that's right, but I never had heard of it before.

(Testimony of David Clark.)

Q. Never discussed with you the fact that Pacific Press is one of the largest printing companies, if not the largest, west of Chicago?

A. I have never heard of it before.

Q. Now, you said you were only employed about 15 or 20 minutes on the 21st, is that right?

A. Oh, no. I would say it was longer than that.

Q. After the conversation with Mr. Collins, you went down to the mail room with Mr. Gagnon.

During the conversation with Mr. Collins, did you ask Mr. Collins if he needed you to train a new man?

A. I asked him if he wanted me to stay around today, and he says no, that it wouldn't be necessary. [66]

Q. He said it wouldn't be necessary?

A. That's right.

Q. Did he tell you at that time that you were being discharged?

A. Well, he told me before that he was going to have—

Q. Answer the question and then you can explain. I just want an answer to the question. Did he tell you in substance or in fact, that you had been discharged? A. Yes.

Q. What did he say in that regard?

A. He said that as long as, that seeing that I would not be taking the job, that he would have to let me go to get some new boy in to train as a fly boy.

Q. Before he said that on the 19th, too, he told you that?

A. He said the same thing on—

(Testimony of David Clark.)

Q. But he didn't tell you, he didn't use the words is what I meant before? A. He didn't say.

Q. He didn't use the word discharge actually.

A. He didn't say you are discharged. He said I would have to let you go.

Q. And the reason he stated that was that this training job contemplated a new man starting at the fly boy position, isn't that correct?

A. That's right. [67]

Q. Now, did you have any conversation about the car insurance on the 21st?

A. On Monday, yes. That's when he mentioned the gas mileage to me.

Q. What did he say in that regard?

A. He said, "We might be able to work out some gas money" but I said, "I will leave it and I still couldn't take it."

Q. Did you tell him "All the other district manager were getting gas mileage, so why couldn't I get gas mileage?"

Did you say anything to that effect?

A. No, because the way I figured it, I didn't know enough about the job and another thing I would be a trainee. I mean I didn't know how it worked, and he said—

Q. Just a minute here. Let me ask the questions and you can give the answers.

You didn't know that the district managers got mileage? A. Yes, I knew.

Q. And you knew that some of your duties as a

(Testimony of David Clark.)

trainee were going to consist of being an assistant district manager, didn't you?

A. Okay, so, but that wouldn't be enough money to keep, for my gas or insurance.

Q. What would your other duties be, Mr. Clark?

A. I don't know.

Q. All duties having to do with driving your car. You knew [68] on the 21st that your car, that you would be compensated for your car, didn't you?

Mr. Mark: I object to that. Now, he has stated that in the past he has known other people that have been compensated for gas mileage. Therefore, Counsel had asked whether or not Mr. Collins stated that he would be reimbursed for gas mileage.

Now, he is changing the question again to whether or not he knew. I think this tends to confuse the witness, and I think we should stay with the point as to whether or not he knew that people had been compensated for gas mileage in the past whether he had actually been told by Mr. Collins that he would be compensated.

Trial Examiner: Well, I think the record shows that he knows that other people that use their cars are compensated, and then on this occasion Mr. Collins indicated that there would be something considered with respect to reimbursing you for—

The Witness: He said—

Trial Examiner: —your expenses.

The Witness: He might, he might.

Q. (By Mr. Bakaly): But in the past when you used your car, Mr. Clark, you received money for hours

(Testimony of David Clark.)

that you didn't work to compensate you for your car; didn't you testify to that?

A. Money for what now? [69]

Q. You were told to put in for hours that you did not work to compensate you for the use of your car on previous occasions? You testified to that here this morning? A. Yes, but not every time.

Q. So from that, didn't you believe on the 21st, that you would get mileage for your automobile?

A. Yes, but I was—okay.

Q. Is the answer yes? You testified that.

A. That is right.

Q. You are unmarried, is that right?

A. That is right.

Q. Do you know the classification or rate of your automobile insurance?

A. Well, right now it's around $280.00 a year and—

Q. Do you know that this is the highest rate charged for any automobile insurance in the county of Los Angeles, the rate for a single— A. Yes.

Q. —under 25 year old for a man?

A. That's right.

Q. Do you also know that the rate for a single man under 25 years of age may be lower if he is using his car in business?

A. Not in our insurance company, because we checked.

Q. Then your answer is you do not know? [70]

A. That I do not know what?

Q. That the rate might be lower if you are using

(Testimony of David Clark.)

your automobile in business and you are under 25 and single?

A. I know it is more because we were told by an insurance agent.

Q. Who is we? A. My father and I.

Q. You were told this when?

A. I don't know. It must have been just a little bit after I got let go, because they were checking to see.

Q. The reason that you gave on the 19th, Mr. Clark, was that your car insurance would be high. At that time you didn't know whether it would be higher or lower, did you? A. Yes.

Q. Mr. Clark,—

A. For one reason. One, Dennis Daines works down there, and there is a lot of these other guys that are young and even married, and even Howard has said this before, that clearing your papers is the most expensive type insurance to cover because—

Q. I'm talking about the insurance rate for a single man under 25, and I'm asking you if on the 19th, when you gave that as a reason for not wanting this new job, didn't the fact that you did not know whether the rates would be higher or lower at that time? [71]

A. I knew. You can ask—

Q. You believed that this would be higher, is that right? A. I knew.

Q. The conversation you had with an insurance man was later than that, wasn't it, Mr. Clark?

A. Yes, but I heard from actual cases— [72]

Q. Just answer my question. I just want to make

(Testimony of David Clark.)

it clear for the record that the conversation you gave previously for knowing the facts, that that conversation was after. A. That was after.

Q. December 19th?

A. That was right, that was after.

Trial Examiner: How long have you had a car or vehicle, Mr. Clark?

The Witness: How long have I had a car?

Trial Examiner: Prior to 1959, December.

The Witness: Of December. The car I am driving now how long I had?

Trial Examiner: Any car.

The Witness: I had a car when I was 16. That's three years ago.

Trial Examiner: You said that you bought a truck?

The Witness: The last car that I have is a truck.

Trial Examiner: When did you get that?

The Witness: It was just before school got out, in June.

Trial Examiner: Of 1959?

The Witness: Yes. I think it was the first week in June, 1959.

Trial Examiner: Do you use the truck for anything other than transporting yourself?

The Witness: No. [73]

Mr. Bakaly: Have you finished, Mr. Examiner?

Trial Examiner: Yes.

Q. (By Mr. Bakaly): Now, on the conversation you had on the 21st, did you state at that time that you wanted to remain on as a flyboy?

A. I asked him if I could keep my present job, yes.

(Testimony of David Clark.)

Q. You stated that on the 21st? A. Yes.

Mr. Bakaly: May I have the same stipulation that such a statement would not appear in—

Mr. Mark: Just a minute.

So stipulate.

Trial Examiner: Would you state the stipulation a little bit more.

Mr. Bakaly: I offer to stipulate that the statements submitted by this witness to representatives of the National Labor Relations Board do not contain a reference to a statement made by Mr. Clark to Mr. Collins on December 21st to the effect that Clark did not—stated he did not—did want to remain at the Daily Breeze as a flyboy.

Mr. Mark: So stipulated.

Trial Examiner: I would like to ask the question if it isn't inconvenient.

Mr. Bakaly: Not at all. Go right ahead. I am getting near the end here. [74]

Trial Examiner: Mr. Clark, did you ever tell Mr. Collins that the reason you didn't want to take the trainee job was because you had made what you considered an agreement with the union that you would not change jobs at the Daily Breeze?

The Witness: Did I ever tell Mr. Collins that I—

Trial Examiner: That is the reason that you didn't want to accept the trainee job?

The Witness: Because I couldn't.

Trial Examiner: Because you have made what I understood you considered to be an arrangement when

(Testimony of David Clark.)

you joined the union that you would not change jobs here?

The Witness: Oh, no.

Trial Examiner: You didn't mention that?

The Witness: No.

Trial Examiner: All right. When you made a reference to the insurance cost, was there any request which you or statement by Mr. Collins that as to how the insurance cost might be compensated for your vehicle?

The Witness: No.

Trial Examiner: Well, was there any mention by Mr. Collins as to a rate per mile, how many cents per mile you would be reimbursed when you used your own vehicle?

The Witness: No.

Trial Examiner: During the course of your work there in the mail room, do I understand that you did not know how much [75] the other district managers were getting?

The Witness: That is right. I knew. I didn't know exactly how much.

Trial Examiner: You didn't have any information on it except that they were getting something?

The Witness: Well, I heard some of them talking about it, but every one was different. I mean, I don't know. I never talked to anybody than—

Trial Examiner: All right.

Q. (By Mr. Bakaly): Now, since December 21, 1959, can you tell us the average number of hours per week that you have worked since that?

(Testimony of David Clark.)

Mr. Mark: I object to that. I don't know whether this is relevant to the issues.

Trial Examiner: I don't see it, Mr. Bakaly.

Mr. Bakaly: Let me see if I can't explain it, Mr. Examiner.

One of our defenses here is that this job was offered, trainee was offered to Mr. Clark which was a better job than the previous job, that he could not take it because of the fact that he wanted to work in Los Angeles for less hours and make more money; this was communicated to us.

Now, it seems to us that if he had since worked in Los Angeles and worked lower hours and received as much or more money as we would pay him, that that is some evidence that [76] this is what he wanted to do, and this tends to show that the leaving of the job on the 21st and the not taking the job—trainee position was voluntarily on the part of the complaining party.

Trial Examiner: So far, I don't believe there is any serious question that the record shows that the trainee job was open to him, but he didn't voluntarily, at least, according to what we have heard so far, relinquish this previous type of work that he was doing there. This is based on what I have heard so far.

Mr. Bakaly: There is no question here but what he couldn't keep the flyboy job and he knew it. There is no issue of that nature here.

Trial Examiner: Now, going from there and taking the intervening history of his employment, and we find that, if I understand you correctly, that you will have employment where he doesn't have so many hours, and

(Testimony of David Clark.)

maybe particularly on Saturday which seemed to be a source of concern for him, would from your theory, as I understand it, cast doubt on whether he wanted to really keep the flyboy job.

Mr. Bakaly: That is right. That is why I said at the beginning this is not really a simple case of whether he was discharged or voluntarily quit. There are really two things. It is our contention that the trainee job was a better job, and that he was offered that just like a transfer would have [77] been. I am sure the Examiner is familiar with cases where there have been transfers from one employment to another, and the Board holds that if the employment is substantially different or detrimental, then there might be a constructive discharge; not if employment is better. Then there is not such a constructive discharge, so that is the first point.

Now, we say that the transfer from the job as flyboy to trainee was not a constructive discharge. We say that he did not take the job as trainee, because he wanted this employment in Los Angeles.

Trial Examiner: Well, I would assume, and I may be incorrect, I would assume that it is the General Counsel's theory that the object offering the other job was to remove a potential union adherent or organizer in a segment of the operation, and that the case of discrimination will be predicated upon that theory. Is that correct?

Mr. Mark: That is correct, Mr. Trial Examiner.

Trial Examiner: Well, I think in view—

(Testimony of David Clark.)

Mr. Bakaly: Only, that is correct, Mr. Examiner, if the new job is a worse job.

Trial Examiner: Well, that may be.

Mr. Bakaly: That is our understanding.

Trial Examiner: I can only hear what I am picking up this morning.

Mr. Bakaly: That is right. I think this colloquy is good, [78] and it sort of lets counsel know where we are going.

Trial Examiner: On the narrow point of whether or not the employment has been reduced and particularly in view of the testimony that Mr. Clark was anxious to cut down on his Saturday chores, I will take this type of evidence. Otherwise, I wouldn't think it would have any significance.

Mr. Bakaly: Very well, thank you.

Q. (By Mr. Bakaly): Prior to that, from what you say, reminds me of this. The job as trainee did not involve Saturday evening, isn't that true?

A. That was, I was told that I wouldn't have to work, you know, straight through on Saturday. I could probably come in like district manager or something.

Q. And work a normal three or four hours or half a day, in other words?

A. Yes, whatever—

Q. It would cut down your Saturday work?

A. That is true.

Q. Now, then, let us get to the employment since.

Trial Examiner: The problem could be treated very generally.

(Testimony of David Clark.)

Mr. Bakaly: Yes. I think so. That is what I want, an average basis.

Q. (By Mr. Bakaly): What is the total number, average number of hours that you worked per week since December 21st? [79]

A. I would say about—I don't know. I average about three days a week, probably since then. That would be about 22 hours or so.

Q. Twenty-two, three hours a week?

A. Yes, somewhere around there, average some weeks more and some weeks less.

Q. What was your average pay per week since then?

A. Probably around—I don't know. I don't know. Probably about 70. Oh, I don't know. Right around 74. Maybe a little more, maybe a little less. I don't know.

Q. Around 70 or 75.00?

A. Yes. Probably somewhere in there.

Q. And this employment has been in Los Angeles as a part-time mailer?

A. Yes. At the Examiner in Huntington Park.

Q. The Pacific Press?

A. The Pacific Press, yes, in Huntington Park, yes.

Q. Now, did you work harder on these jobs than you worked at the Daily Breeze?

A. Oh, physically, yes. Physically it is harder.

Q. Did you tell Mr. Collins on the 22nd, that the work you had performed the 21st, was "rough"?

A. Yes, it was. Well, it was, it was a lot of tying.

Q. Did you have a conversation with Mr. Collins on the 22nd? A. Yes. [80]

(Testimony of David Clark.)

Q. Did you receive pay for the week ending Friday the 18th?

A. Yes, That was the Friday the 18th?

Q. Tuesday was the normal pay period for the preceding week ending on a Friday?

A. That is right.

Q. Did you also receive a check for Saturday and three additional days?

A. That is right. Saturday through, yes, Wednesday.

Q. Did Mr. Collins say to you that these three additional days was in the form of severance pay?

A. Yes.

Q. Did you say you were very happy about that?

A. I said—well, that is a lot, yes.

Q. And you were happy on the 22nd, isn't that correct?

A. About receiving the money, yes, for not working, sure.

Q. You weren't mad at Mr. Collins?

A. Oh, no. What was there to be mad about.

Q. You have never been mad about Mr. Collins?

A. Well, we are friends.

Q. You are still friends? A. I hope so.

Q. You didn't believe he was trying to harm you by offering you the job as a trainee, did you?

Mr. Mark: I object. Again I don't think this is relevant at all. [81]

Trial Examiner: I don't think so either.

Mr. Bakaly: Very well.

Q. (By Mr. Bakaly): On the 22nd, did you com-

(Testimony of David Clark.)

plain about not working as a flyboy at the Daily Breeze?

A. Did I complain about it?

Q. Yes.

A. No. He asked me if I still wanted the trainee job, and I told him no I couldn't take it.

Q. Did you ask to be reinstated by the Daily Breeze?

A. On Tuesday?

Q. Yes. A. No.

Q. Have you at any time since then asked to be reinstated? A. No.

Q. Have you ever asked to be reinstated?

A. Yes.

Q. For your job at the Daily Breeze?

A. What was that?

Q. Have you ever asked to be reinstated for your job at the Daily Breeze?

A. No, not to be reinstated, no.

Q. Prior to December 19th, 1959, did you ever have a conversation with a representative of the mailer's union in which he stated that he would get you a job in Los Angeles where you would work fewer hours for more money than what you were making [82] at the Daily Breeze? A. No.

Q. Or words to that effect? A. No.

Trial Examiner: When did you get this job where you started to work on the 21st?

The Witness: Well, see, after I left the Breeze on that day, I went home and told my father about it.

Trial Examiner: Which day, the 19th?

The Witness: Monday, the 21st.

(Testimony of David Clark.)

Trial Examiner: And you went to work that night?

The Witness: I went home and I told my dad about it, and he phoned up the union office and told them what had happened. He says, "Well, you know how it is."

Mr. Bakaly: Object to this, Mr. Examiner, as hearsay.

Trial Examiner: I was just asking when he got the job and the answer is—

The Witness: It was Monday afternoon.

Trial Examiner: —is that he got it on that night. The other part may be stricken.

Mr. Bakaly: Thank you.

I don't believe I have any more questions at this time. I take it that Mr. Clark is going to remain available throughout the day, isn't he?

Mr. Mark: Yes, yes, he is. [83]

Mr. Bakaly: And if something does come up, we could recall him under 43(b).

Trial Examiner: Do you have any redirect, Mr. Mark?

Mr. Mark: Yes, I do.

Redirect Examination

Q. (By Mr. Mark): Dave, you testified that you did not have a conversation with anybody from the Mailers Union in regard to obtaining you a job for less hours— A. That's right.

Q. —and better pay?

Did you have a conversation with him in regard to obtaining a job?

A. No. The reason for me joining the union was

(Testimony of David Clark.)

to try to improve the conditions down there at the Breeze.

Mr. Bakaly: I move to strike that as not responsive to the question.

Trial Examiner: Granted.

Q. (By Mr. Mark): You testified that you told Mr. Collins that you might be able to get a job in Los Angeles? A. That is right.

Q. What did you base that opinion on?

Mr. Bakaly: Do you mean statement?

Q. (By Mr. Mark): Statement.

A. Well, on the union representative, what he had told me.

Q. What was that? [84]

A. That if, you know, if they fired me for joining the union, they would see that I got enough work.

Q. But there was at no time that you had been promised or even sought a job?

A. No, I couldn't have because—

Q. All right. Now, when did you obtain your truck?

A. It was the first week of June, 1959.

Q. Approximately how many times did you actually use it to help out the Daily Breeze?

A. No more than, I think it was four.

Q. Were you always reimbursed for the use of your truck?

A. Not—twice I was and twice I wasn't.

Q. I believe your testimony was that at one point you said you didn't want to use your truck any more?

A. I told Dennis that because—

(Testimony of David Clark.)

Q. Dennis who? A. Dennis Daines.

Q. What did you tell him?

A. I told him that I didn't want to use it any more because my folks didn't want me to drive it because I didn't have it insured to cover me for the use of the truck.

Q. Was it your honest belief on December 19th and on December 21, that the insurance rates for your truck were going to be higher? A. Yes. [85]

Q. Was this belief based on conversations you had had with other people in the operation of the Daily Breeze who used their trucks?

A. Yes, that's what it would be, yes.

Mr. Bakaly: I object to that, Mr. Examiner. We can't meet that kind of testimony.

Trial Examiner: It does not matter what it is based on. He said that he believed it would be higher, and I think that the rest of it is inadmissible, Mr. Bakaly.

Mr. Mark: All right.

Q. (By Mr. Mark): You also testified, Dave, that you were interested in working less hours on Saturdays?

A. Yes.

Q. What was your normal schedule on a Saturday or supposed schedule on a Saturday?

Mr. Bakaly: Do you mean as a flyboy?

Q. (By Mr. Mark): When you first began, how many hours did you work on a Saturday?

A. Well, when I first began I was told—

Q. As a flyboy?

A. Well, I first started, the first Sunday paper started, I was told the paper would get off around 1:00 o'clock or so, you know, varied—

Q. When did the first Sunday payers start?

A. I don't know. It was five months, six months. It could [86] have been a longer time. Time goes so fast. I don't know. Maybe longer than that. I don't know.

Q. And you were told that you would have to work how many hours, please?

A. That I would go in, four in the afternoon and that I would get off from—well, varying, maybe earlier, maybe little later, around 1:00 o'clock.

Q. Were these hours satisfactory to you?

A. I figured that it was all right, because I could have Sunday off.

Q. Did you absolutely work these hours?

A. No.

Q. What hours did you actually work?

Trial Examiner: At what time is this?

Mr. Mark: We are restricting it to Saturday.

Trial Examiner: Yes, but I mean what year was it.

The Witness: 1959.

Trial Examiner: You are talking about 1959?

The Witness: Yes.

Trial Examiner: All right.

The Witness: Well, the earliest I have got out of there was around a quarter to four, but on the average it would be somewhere between 5:30 and 6:00 and there is a lot of times, quite a few times, I got off at 9:00, 10:00 in the morning.

Q. (By Mr. Mark): So when you testified that

(Testimony of David Clark.)

you were [87] interested in reducing the hours of work you were putting in on Saturdays, did you mean the actual hours on Saturday or the hours you carried over from working on a Saturday and into Sunday?

A. I meant that I didn't want to work—I mean I would like to work just like what they said. Maybe to 1:00 o'clock and that's it, but carrying on through Sunday, you know—

Q. What would you say the least hours you worked per week was?

A. The least?

Q. Yes.

Trial Examiner: I think we have gone over that, Mr. Mark. We have had a range of estimates.

Q. (By Mr. Mark): Well, in the event that you worked—

Trial Examiner: Are you talking just about Saturday or the total?

Mr. Mark: I am talking about the total hours.

Trial Examiner: That is in the record.

Mr. Mark: All right.

Q. (By Mr. Mark): In the event that you worked less than 40 hours, were you paid for 40 hours?

A. Yes.

Q. On what basis?

A. On the basis that on the weeks that I would work over 40 hours, those hours would be added on to the weeks that I [88] was short.

Q. In regard to your employment at Pacific Press, did you in any way make arrangements for that job prior to being let go? A. No.

(Testimony of David Clark.)

Q. When Mr. Collins told you that he would have to let you go, was it your understanding that you were discharged? A. Yes, it was.

Q. Was it at that time that you asked Mr. Collins whether he wanted you to stick around?

A. Yes.

Q. And Mr. Collins' reply to you was what?

A. It wasn't necessary.

Q. You testified that you were getting $1.50 an hour?

A. That is right.

Q. And earlier you had testified that Mr. Collins told you they were paying union wages. Is $1.50 an hour union wages for mail room clerks?

A. No.

Q. Is it under or over union wages?

A. It is under.

Q. How much under?

Mr. Bakaly: I don't see the materiality of this, Mr. Examiner.

Mr. Mark: I just wanted to clear up a piece of testimony, Mr. Trial Examiner, that had gotten into the record earlier [89] and that was that Mr. Clark testified that Mr. Collins stated he was paying union wages in regard to it.

Trial Examiner: Well, we really don't have him qualified to make the answer and also it is once removed. It is a statement attributable to Mr. Collins which might be more directly approached through him.

Mr. Mark: Certainly.

(Testimony of David Clark.)

Trial Examiner: Or someone with the union that knows what the union wage scale is.

Now, if this witness knows, and you can qualify him, then, why it is something else, of course.

Mr. Mark: Well, let me then ask this question?

Q. (By Mr. Mark): In the course of your employment at Pacific Press, have you been working as a mail room clerk?

A. Yes, I have been working as a mailer, yes.

Q. Are you getting union wages there?

A. Yes.

Q. What are those wages?

A. Well, for a seven-hour shift it is $27.00 and something. I don't know.

Q. That is an average of over $3.00 an hour?

A. Yes.

Trial Examiner: Is this the same type of work in general that you were doing?

The Witness: Yes. In general. It is magazines instead [90] of newspapers, but other than that it is the same.

Mr. Mark: I have no further questions.

Recross-Examination

Q. (By Mr. Bakaly): Did you know prior to December 19, 1959, that the mailers wages were over $3.00 an hour in Los Angeles?

A. I didn't know if they were over $3.00 an hour. No. I didn't know exactly. I know they paid more than what I made now.

Q. I didn't mean exactly. I mean about $3.00 an hour?

(Testimony of David Clark.)

A. Yes. I figured they made about the same as printers or press—

Q. About double? A. Yes.

Q. You knew that before December 19th?

A. Yes.

Mr. Bakaly: I have no further questions.

Trial Examiner: Thank you, Mr. Clark.

(Witness excused.)

Trial Examiner: Off the record.

(Discussion off the record.)

Trial Examiner: We will recess at this time until 2:00 o'clock.

(Whereupon, a recess was taken until 2:00 o'clock p.m.) [91]

After Recess

(Whereupon the hearing was resumed, pursuant to the taking of the recess, at 2:00 o'clock, p.m.)

Trial Examiner: Come to order, gentlemen.

Mr. Mark: The General Counsel would like to call Mr. Bernard Clark to the stand, please.

BERNARD CLARK

a witness called by and on behalf of the General Counsel, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Mark): Mr. Clark, would you state your full name, please.

A. Bernard J. Clark.

Q. What is your occupation? A. Printer.

(Testimony of Bernard Clark.)

Q. What is your relationship to David Clark?

A. David is my son.

Q. You have heard David testify that on Saturday, December 19th, he called you and informed you that he was offered a trainee position, is that correct?

A. Yes.

Q. And that you were to talk to Mr. Collins on that day, is that correct? A. Yes.

Q. Did you meet Mr. Collins on Saturday, December 19th? [92]

A. Yes, I did.

Q. Have you known Mr. Collins before?

A. Yes. I have known him a good many years.

Q. Is it on a personal friendly basis?

A. Yes. We have been friends.

Q. At what time on December 19th did this meeting between you and Mr. Collins take place?

A. It was about 11:00 o'clock in the morning.

Q. Where did you meet, where did the meeting take place?

A. Well, I met him in the mail room, and he said, "Let's go over and get some coffee," and we went over across the street at the Spanish Inn, the restaurant there.

Q. Was it just you and Mr. Collins that went there?

A. Just the two of us went over there, yes.

Q. In the course of your conversation with Mr. Collins, where did you sit down? Did you sit down in a booth or at a table?

(Testimony of Bernard Clark.)

A. We were in a booth at about the farthest from the entrance to the door, going in there.

Q. Just the two of you were sitting in a booth at the time? A. Yes.

Q. Well, could you recount to us, please, now the conversation between you and Mr. Collins?

A. Well, I told him first that Dave told me Friday night that Mr. Collins had asked him if he had his card and he said no, and I said that was a misconception. Dave, that he didn't [93] understand the question, that he should have told him yes, while he didn't have his working card, he hadn't received his working card, he was a member of the union at that time.

Q. What did Mr. Collins say to that?

A. And he said, "Well, that's what shocked me."

He says, "That's what I didn't understand."

And then I asked him, I said, "Well, how did you find out that Dave had joined the union."

He says, "Oh, somebody told me."

You know, I asked him if he would tell me who it was.

He said, "He didn't remember."

Q. Well, did you have any further conversation, discussion about the union at this time?

A. Well, he said, "Well, what is the union going to do?"

I told him, I said, "I am not a member of that union. I couldn't say," but I said, "They will probably contact you and set up an apprenticeship program for Dave and they will negotiate on that;" and, Mr. Collins, he said—well, he wasn't really against the union, but he

(Testimony of Bernard Clark.)

didn't want the union in the mail room because he wanted complete control of the mail room.

I told him, I said, "Well, even if it is union, it will still be your department, that you will be in control of it." [94]

Q. Did you discuss Dave's trainee position at this time?

A. Well, he come up, he said, "Well, they had a trainee program for him." He said his job would be to show up at the time to make sure that all the district route men were there. If there was not, he was to run their route. Then after they had been done, he was to drive around and make sure that the boys were out delivering their papers and do a few things like that.

Q. What did you tell Mr. Collins?

A. Well, I told him that that was all because we had had insurance, not trouble, but the insurance company, they really frown on insuring 19-year-old boys.

When we went to purchase the truck, it is a Ford Ranchero which could have been used both as a pleasure car or as a truck, they agreed to—

Mr. Bakaly: I move to strike that "they agreed" as hearsay and no foundation for who they is.

The Witness: The insurance company.

Trial Examiner: Excuse me, please. There is an objection, Mr. Clark. We will dispose of it before you answer.

It is my impression that it will not be determinative here as to whether this is actually correct, but—

Mr. Bakaly: The objection goes to foundation. I

(Testimony of Bernard Clark.)

don't know who he is talking about. It may not be hearsay.

Trial Examiner: It goes to motive rather than truth of facts, so would you detail for us before you go on to tell us [95] what information you got from the insurance company, who it was, and when you got the information, Mr. Clark.

The Witness: Oh, I called our agent from the Farmers Insurance Group.

Trial Examiner: Who is he if you know?

The Witness: Mr. Peterson, I believe is the head agent on that office.

Trial Examiner: When was that?

The Witness: That was the day that he bought the Ford Ranchero. That was sometime in June, the first week of June, I believe it was.

Trial Examiner: Of 1959?

The Witness: Of 1959.

Trial Examiner: Did you talk to Mr. Peterson?

The Witness: Yes. I talked to him on the phone before we purchased the car.

Trial Examiner: The subject concerned insurance on the car, is that correct?

The Witness: Yes.

Trial Examiner: All right. Tell us what you heard from Mr. Peterson on that occasion?

The Witness: He said that he would issue insurance on the car for David only if it would be used for pleasure; that he couldn't use it in business at all. They have it on the insurance papers that he was working at the Daily Breeze, and he called it [96] to my

(Testimony of Bernard Clark.)

attention. He says, "Now, he will not be delivering papers in that truck, will he;" and I said, "No."

Trial Examiner: Was that the only contact that you had with Mr. Peterson until after, if you had any more, but during the time that your son was still employed, up until the end of December?

The Witness: Yes. One other time.

Trial Examiner: In between that time?

The Witness: Yes. When I went back to pay the premiums on there.

Trial Examiner: When was this?

The Witness: That was, let's see, about four days later.

Trial Examiner: What was said on that occasion?

The Witness: He wanted to know definitely if the car was really used for pleasure or for business.

I told him for pleasure. He said that if it is used for business, that they would have to transfer us to another insurance company and the rate was much higher.

Trial Examiner: Did he tell you how much higher?

The Witness: He said from four hundred to $450.00.

Q. (By Mr. Mark): Now, returning to your conversation with Mr. Collins, did you tell Mr. Collins then that it was your thought that David could not take the job because of the insurance?

A. Yes. That's right, and then he mentioned the sum of $55.00, [97] and he was already making sixty, and so I, I told him he just couldn't take it; namely, because of the insurance on his truck.

(Testimony of Bernard Clark.)

Trial Examiner: Did you during this occasion that you are talking of with Mr. Collins, ask him how David would be reimbursed in connection with the use of his Ford Ranchero, if he used it in company business?

The Witness: No. He didn't say other than I am paying him other than fifty-five.

Mr. Bakaly: I move to strike the answer as non-responsive.

Trial Examiner: All right. The question is did you ask him how he would be reimbursed, to find out what the measure of reimbursement would be in connection with this, the use of his truck?

The Witness: No. That wasn't mentioned.

Q. (By Mr. Mark): When Mr. Collins described the trainee position to you, did he describe the duties and did he describe the reimbursement as being $55.00 a week, is that correct? A. Yes.

Q. And there was nothing further said by Mr. Collins about any other kind of reimbursement for use of the truck? A. No.

Q. Did you tell him that David could not take the position?

A. That's right. I told him he couldn't take that position.

Q. What did Mr. Collins say?

A. He said, "Well, what am I going to do with him"? [98]

I just said, "Leave him on the present job. The job is still there."

Q. What did Mr. Collins say to that?

(Testimony of Bernard Clark.)

A. Well, he said he wanted to set up this training program.

I said, "Why don't you put someone else in there in that, in that the two jobs were not the same."

Q. What did Mr. Collins say to that?

A. Well, mostly his conversation come back, "What is the union going to do?"

Mr. Bakaly: I move to strike that as not responsive. I think we can move along a lot faster, Mr. Examiner, if the witness would be instructed to answer, to listen and then answer the question.

Trial Examiner: Yes. What these questions call for is what was said, and you generally characterize what he most likely talked about. Maybe eventually that will be an answer, but it isn't right now. We are still trying to get what you said to him and what he said to you insofar as you can recall.

Mr. Bakaly: I don't think the question has been answered. That was my objection, that there is a question asked about one subject and then he went on into another subject without giving an answer to whether that subject was covered or not. That was my objection. That question ought to be answered.

Trial Examiner: Do you have the question in mind?

Q. (By Mr. Mark): What did Mr. Collins say after you told [99] Mr. Collins, "Why don't you put someone else in that job?"

A. Well, He said he wanted Dave to have the job and still work at the press there.

(Testimony of Bernard Clark.)

Q. Did he say at that time that he was going to terminate Dave?

Mr. Bakaly: I object to that as leading and suggestive.

Trial Examiner: Let us find out what his memory is first.

Q. (By Mr. Mark): Did Mr. Collins say anything else after that?

A. Well, I don't know. We had just a lot of general conversation.

Q. How long did your conversation last?

A. The first part was about 15 minutes when we were by ourselves.

Q. Who joined you after 15 minutes?

A. Jim Hill.

Q. Who is Jim Hill?

A. As I understand it, he is a private contractor for the distribution of advertising papers published in the Daily Breeze.

Mr. Mark: May we go off the record?

Trial Examiner: Off the record.

(Discussion off the record.)

Trial Examiner: On the record.

Q. (By Mr. Mark): Mr. Clark, did you or did David contact Local 9 about joining the union? [100]

A. I did.

Q. You did? A. Yes.

Q. When was that?

A. Oh, shoot, I don't know. I can't recall the date. I contacted the vice-president of the Mailers Union that worked at the same place where I did.

(Testimony of Bernard Clark.)

Q. How long before the Saturday, December 19, would that have been?

A. Oh, probably four or five weeks.

Q. Four or five weeks?

A. Yes, the first time I talked to him.

Q. When did David join you?

A. Let's see. I thought it was on a Monday.

Q. That was the Monday prior to—

A. Yes. It was just one week before, of that Monday.

Q. At the time that you discussed or that you talked to the union representative, did you make any arrangements for Dave going to work at any other place? A. No.

Q. Was there any talk about David going to work at any other place? A. No.

Q. It was not then your purpose for David to obtain employment elsewhere by joining the union, was it? [101] A. No.

Mr. Bakaly: Mr. Examiner, I move to strike the answer for the purpose of an objection. The last three or four questions have all been leading and suggestive. The proper way to find out what was said in the conversation, is to ask what was said, not to direct the witness by this kind of questioning.

Trial Examiner: Of course this is something that wasn't said and it is rather hard to develop it in the record unless the question is fairly indicative of what the specific topic is. This was something that was not—

Mr. Bakaly: We all know.

Trial Examiner: Well—

(Testimony of Bernard Clark.)

Mr. Bakaly: We have to know what was said before you can find out what wasn't said. He hadn't said what was said in this conversation.

Trial Examiner: This is the conversation between the representative of the Mailers Union and Mr. Clark?

Mr. Bakaly: That is right, wherein he contacted the union. That was his testimony.

Trial Examiner: Well, it might obviate some cross-examination, if nothing else, Mr. Mark, if we get a recital of what Mr. Clark recalls about it.

Q. (By Mr. Mark): You say four, five weeks prior to the Saturday you had talked to the union representative? A. Yes. [102]

Q. Do you recall who you talked to?

A. Mr. Babior.

Q. What is Mr. Babior's title?

A. He is vice-president of the Mailers Union.

Q. Is that Local 9?

A. Local 9.

Q. At the time you talked to Mr. Babior, did you talk to him in person or by the phone?

A. In person.

Q. Where?

A. Roger McDonald Publishing Company.

Q. Was there anybody else present at the time of this conversation?

A. There were other people around us. I mean no one participated in this conversation except the two of us.

Q. Did you talk about Dave's joining the union at that time?

(Testimony of Bernard Clark.)

A. No, not of Dave's joining the union.

Trial Examiner: Can we have what they talked about, please?

Q. (By Mr. Mark): What did you talk about on that occasion?

A. Well to inform them, to investigate working conditions and the South Bay Dailey Breeze, and my boy David who was 19 and two young teenage boys of working around or working 12, 14, 16 hours shifts on Saturday and Sunday.

Q. Was that the entire conversation at that time? [103]

A. And wanted them to look into it and see if something couldn't be done about it.

Q. What did Mr. Babior say?

A. He said that he would take it up with the other officers and see about it.

Q. Did you talk to Mr. Babior at any other time thereafter?

A. I had seen him in the course of our work, and occasionally we would comment on it, that they was going to look into the matter and investigate it.

Q. Well, did you have any other conversations with Mr. Babior? Did you have any other conversations with him after that one?

A. I think probably once a week for the next four weeks.

Q. Were they long conversations or short conversations?

A. No, just short conversations.

(Testimony of Bernard Clark.)

Q. How many of these conversations took place, would you say?

A. I think there were four.

Q. Four. And the second of these conversations, did you mention anything about David joining the union?

A. Mr. Babior asked me if I thought Dave would be willing to join the union if he was, if the opportunity was presented to him, and I said I thought he would.

Q. Did you talk to Mr. Babior again on another time?

A. Yes. I just asked him then if the union was investigating it any more? And he said that they had talked about it at some other meeting. [104]

Q. When was this in terms of, you know, in relationship to Saturday, December 19? How long before that?

A. Well, let's see. The first time would be five, approximately five weeks before that Saturday.

Q. And the second conversation?

A. Would be one week later from the first one there.

Q. And these conversations occurred once every week?

A. Yes. It was on Thursday nights when Mr. Babior was around there that I seen him.

Q. When David joined the union, where did he join?

A. At our home.

Q. Was Mr. Babior present at the time?

A. No. Mr. Leathem.

(Testimony of Bernard Clark.)

Q. Mr. Who?

A. Leathem.

Q. What is Mr. Leathem's title?

A. He is an organizer for the Mailers Union No. 9.

Q. When was this?

A. That was the Monday, well, before—that was just one week before he was let go that Monday.

Mr. Bakaly: I understand that these are hearsay conversations as to the respondent, and I suppose the only purpose is to show why he had his son join the union. Is that right? I mean these statements are certainly not binding upon the company that there was any effort made of organization or [105] anything like that.

Trial Examiner: Well, the company's knowledge, of course, has to be shown, independently.

Mr. Bakaly: Relating to the statements, that is right.

Trial Examiner: But this series of questions arose from the fact that we wanted—

Mr. Bakaly: To know what was said, that is right.

Trial Examiner: And also what was not said.

Mr. Bakaly: That is right. We have gone on now to other conversations, and I just wanted to make that clear. I am not objecting to the testimony.

Q. (By Mr. Mark): Now, this particular Monday, Mr. Leathem was at your home. What time was that?

A. That was probably 11:00 o'clock in the morning.

Q. In the morning? A. Yes.

Q. Who was present at your home at that time?

(Testimony of Bernard Clark.)

A. My wife and myself and David.

Q. Did David sign a card at that time?

A. Yes.

Q. Did he tender any initiation fees?

A. Yes.

Q. Did he receive any card at that time from the union?

A. He received, oh, some form that he signed. I didn't, I didn't read it, though. [106]

Q. In the course of all these conversations with the union representatives, whether Mr. Babior or Mr. Leathem, was there at any time any mention made about procuring a job for David through the union?

A. No.

Q. Was there any mention made of any arrangements in the future to procure the job for David through the union?

A. Mr. Leathem said that if he was discharged due to union activity that the union would probably procure him a couple of day's work a week, so he would have some money to meet his obligations.

Q. But there were no arrangements made whatsoever for David to obtain employment at any other place? A. No.

Q. Now, I am talking about the period prior to December 19. Now, after your conversation with Mr. Collins, did you talk to the union representative at other times?

A. Yes. When David come home and said that he had been discharged.

Q. When was this?

(Testimony of Bernard Clark.)

A. That was Monday. I don't know what the date would be.

Q. Is this Monday, December 21st we are talking about? A. Yes.

Q. How did you contact the union representative?

A. I called union headquarters and asked for Mr. Mathiesen. [107]

Q. Who is Mr. Mathiesen?

A. He is the president of the Mailers Local No. 9.

Q. Did you talk to Mr. Mathiesen at the time?

A. Yes, I did.

Q. What time was this?

A. That was about 2:30 in the afternoon, I believe.

Q. Were you calling from your home or from work?

A. Yes, from home.

Q. Was David present at the time?

A. Yes.

Q. Were arrangements made at that time for David to go to work? A. Yes.

Q. Where was David to go to work?

A. He was working one shift at Pacific Press that night.

Q. Prior to this time, there had been no arrangements made for David to go to work for any other employer than South Bay Daily Breeze?

A. No, none.

Q. Returning to the conversation with Mr. Collins on the 19th of December, you say the first part of the conversation lasted 15 minutes and then you were joined by Mr. Hill?

(Testimony of Bernard Clark.)

A. Yes.

Q. Is that correct?

A. Yes.

Q. How long did the entire conversation last? [108]

A. Approximately 45 minutes.

Q. In the course of that conversation, how long would you say you talked about the trainee position?

A. That was taken a very few minutes on that. There was very little time spent on that.

Q. What was the other subject of conversation at that time about, if any?

A. About the Mailers Union.

Q. And—

Trial Examiner: Do we have everything that was said by the people that participated in the meeting about the Mailers Union?

The Witness: Yes.

Trial Examiner: Have you told us everything that was said?

The Witness: Yes.

Trial Examiner: By Mr. Collins and yourself and this other gentleman by the Mailers Union?

The Witness: After he joined us, that was just general conversation. He joined into a lot of things, you know.

Trial Examiner: Well, I don't know unless you tell me, Mr. Clark, and we can't tell—the only way we can at least obtain from you what was said is if you will tell us.

The Witness: What Mr. Hill said or things like that?

(Testimony of Bernard Clark.)

Trial Examiner: Well, you said there was a substantial amount of time devoted to the topic of the Mailers Union. [109] Now, other than your statement, I think was the only thing bearing on that topic which said Mr. Collins wanted to know what would happen. I don't think there has been anything related in your testimony as to who said what in connection with the Mailers Union on this occasion.

The Witness: I really don't follow that question.

Trial Examiner: Well, maybe the reporter can read it, and I can listen to see how I might improve it.

(Record read.)

Trial Examiner: Do you understand that, Mr. Clark?

The Witness: Well, let's see. No, I really don't.

Trial Examiner: You don't understand the question?

The Witness: No, I really don't.

Trial Examiner: Now, stating it another way, perhaps, you have told us that there was some, quite a bit of talk about it, but you haven't told us what was said and who said it about the Mailers Union.

The Witness: Oh, I see.

Trial Examiner: And that is what we are here after.

The Witness: Well, other than Mr. Collins wanting to know what the union was going to do, I said that they would contact him, and then when Mr. Hill come in, start talking about the union, he didn't think it was a good idea. He had worked in a, he said there

(Testimony of Bernard Clark.)

had been a union mailers, and he didn't like it there, and— [110]

Trial Examiner: Where is this?

The Witness: Where he said that he had worked at a place. I don't know.

Trial Examiner: I see.

The Witness: That, that's when Mr. Collins, he just, he didn't want to give up control of the mail room. I told him that he didn't have to give up the control of the mail room. He could still be in charge of it.

Then Mr. Hill went on telling how he had trouble with his 100 to 110 boys at that advertiser he was telling us about, about the trouble there; that was, took about the balance of the conversation.

Trial Examiner: All right.

Q. (By Mr. Mark): So that part of the conversation, part of the time of the conversation was taken up by Mr. Hill's statements about trouble he was personally having and nothing to do with South Bay Daily Breeze, is that correct?

A. No, that is right.

Q. Did Mr. Collins at that time say what he was going to do with David and the flyboy job?

A. No. He kept asking me, he said, "Well, what will I do with David," and I replied every time, I said, "Just leave him in the present job. The job is still there."

Q. What did he say?

A. He said, well, that he wanted to get the trainee program [111] started, and he wanted Dave to

(Testimony of Bernard Clark.)

take the job, but I told him that he would just, couldn't do it.

Q. Did he say anything else after that?

A. No. I left and he, well, I mean, I left, he said, "Well, we will work it out some way."

That was the last word I had with Mr. Collins.

Q. Were his last words, "Well, we will work it out some way?" A. Yes.

Q. Now, after David's discharge, did you contact any insurance agent in regard to the rates?

Mr. Bakaly: I object as assuming facts not in evidence.

Mr. Mark: I think this is—

Trial Examiner: Well, I think it is referring to the use of the word "discharge".

Mr. Bakaly: That is exactly right.

Mr. Mark: I am sorry.

Trial Examiner: After his termination.

Q. (By Mr. Mark): After his termination, did you contact any insurance in regard to insurance rates on David's transportation?

A. I went back to the insurance again and had a conversation with Mr. Abrams, I believe.

Q. Is that Mr. Abrams of the Labor Board?

A. Of the Labor Board. He said he didn't think that the insurance was any higher. [112]

Q. Just a minute, please. I am not following you. Is it Mr. Petersen or Mr. Abrams you are talking about?

A. Mr. Abrams, when I was having a conversation here with him.

(Testimony of Bernard Clark.)

Q. I see.

A. And we told him about the reason that he couldn't take it was because of insurance, and Mr. Abrams said that he didn't know that it was any higher. He said that he had talked to an insurance agent, and he said it would probably be about the same.

Q. Now when was this conversation with Mr. Abrams?

A. I don't know. You got it in your files there.

Q. Was this after David's termination?

A. Yes.

Q. Was this after you had filed the charge or David had filed the charge? A. Yes.

Q. Did you thereafter talk to an insurance agent?

A. Yes, I did.

Q. Did you talk to him about the rates on the Ranchero truck? A. Yes.

Q. Was this the insurance agent you spoke of?

A. No.

Q. Who was it?

A. It was one of the agents in the office there. I don't know his name. [113]

Q. At whose office?

A. Mr. Peterson's office.

Q. What were you told at that time? Did you contact him personally or by phone?

A. No. I went in and seen him.

Q. I see.

A. And I told him the statement that Mr. Abrams had told me, that the insurance would not be any higher, and he said that they didn't have any insurance that

(Testimony of Bernard Clark.)

covered that, that they would have to contact a special insurance company, that there is only four companies that carry that insurance, is what he told me; and they would write the coverage on there. He said it would run between four hundred and four hundred and fifty dollars.

Q. Was it your honest belief at the time you talked with Mr. Collins that the insurance rates on David's truck were higher?

A. Yes, because of the conversations I had when we were going to purchase the truck and then the conversation I had when I went over to pay the premium on that.

Q. These are the conversations you have already related in your former testimony?

A. Yes.

Mr. Mark: I have no further questions.

Cross-Examination

Q. (By Mr. Bakaly): You just stated you made some statements [114-115] to the National Labor Relations Board, made an affidavit? A. Yes.

Mr. Bakaly: I would like to demand the production of all statements made by this witness, and I request a short recess.

Mr. Mark: May the record reflect that the General Counsel is providing the statement requested.

Mr. Bakaly: Yes.

Mr. Mark: That is the only one.

Trial Examiner: We will take a short recess.

(Short recess.) [116]

(Testimony of Bernard Clark.)

Cross-Examination (Continued)

Trial Examiner: On the record.

Q. (By Mr. Bakaly): Who is the registered owner of the Ranchero automobile? A. I am.

Q. You and anyone else? A. My wife.

Q. Your son, David, is not one of the registered owners? A. No.

Q. Who drives the car most of the time?

A. David.

Q. Do you have any other automobiles?

A. Yes.

Q. Is the Farmers and Merchants Insurance Company aware of the fact that David drives your car?

A. Yes. He drives the Ranchero.

Q. Are they aware of that fact? A. Yes.

Q. You have told them that? A. Yes.

Q. And you pay the rate applicable to a single, unmarried male, under the age of twenty-one?

A. Yes.

Q. On that car? A. Yes. [117]

Q. How much insurance do you pay on that car?

A. I believe it's $280, I believe.

Q. For that car?

A. Yes.

Q. Or for all of your cars?

A. No, for that one.

Q. What does that coverage include?

A. Fire, theft, $100 deductible, comprehensive, I believe.

Q. That would be the fire and theft?

A. Yes.

(Testimony of Bernard Clark.)

Q. How much personal liability and property damage?

A. $10,000, $20,000.

Mr. Bakaly: I didn't hear that, with the door closing.

Trial Examiner: Ten and twenty.

Q. (By Mr. Bakaly): That is insurance with the Farmers and Merchants Insurance Company?

A. The Farmers—Farmers Insurance Group, it's called.

Q. And that is $280 annually, per year?

A. Yes. Of course, I might say those aren't really exact figures, it's right close in there.

It could be a few dollars, one way or the other, more or less, but just a few dollars.

Q. You testified that they told you that if David drove the car in business, the premium would be $480?

A. No, they said between $400 and $450, but they didn't [118] carry it at that, that they would have to transfer his insurance to another company

Q. Transfer his or yours?

A. The insurance on the Ford Ranchero.

Q. Who is named as the insured in the policy?

A. I guess I am. I don't know.

Mr. Mark: May I just interpose here.

If there is any question about this, if there is going to be any contention made, we can ask Mr. Clark to return with the policy, that would be the best evidence.

Trial Examiner: Or else give it to you.

Mr. Bakaly: I think that would probably be satisfactory. I'm about finished with these questions, anyway.

(Testimony of Bernard Clark.)

Trial Examiner: All right.

Would you make that available to Mr. Mark, your policy, so that we can get more definite information with respect as to who is being named the insured and so forth?

The Witness: I can do that. I'm quite sure, I mean, the insurance policy is under my name, but it has the rating, it's what they call a No. 2 rating.

That's so a person, a single person, an unmarried man under twenty-five, can drive the car.

I am quite sure the insurance company has David's name as the one on there.

Mr. Bakaly: Well, your policy will show us, whatever it is. [119]

Q. (By Mr. Bakaly): You testified that you are a printer? A. Yes.

Q. Are you a member of the International Typographical Workers Union? A. Yes.

Q. Commonly known as the ITU? A. Yes.

Q. What local? A. 174.

Q. That's a printer local? A. Yes.

Q. Do you know Howard Collins? A. Yes.

Q. How long have you known him?

A. About six years.

Q. Isn't it correct that your relationship with him has been one of friendship in the last six years?

A. That's right.

Q. You are close, personal friends?

A. That's right.

Q. You used to stop in and have coffee with Mr. Collins on many occasions?

(Testimony of Bernard Clark.)

A. That's right.

Q. During the whole six-year period?

A. Yes. [120]

Q. You have talked with him on numerous occasions about your son David?

A. That's right.

Q. You were interested, are interested in your son continuing in school?

A. That's right.

Q. Is that correct? A. Yes.

Q. Did you have a conversation with Mr. Collins sometime in June of 1959 concerning your son's staying in school? A. That's right.

Q. At that time your son had indicated that he wanted to quit school and go to work?

A. Yes.

Q. To you, I mean? A. Yes.

Q. And you solicited Mr. Collins' help in keeping David in school, is that correct?

A. That's right.

Q. One of the reasons that David wanted to quit school was so that he would have more time for rest and relaxation, isn't that correct?

A. His argument at that time was that he was tired of studying, that's all.

Q. He likes to surf, doesn't he? [121]

A. Yes.

Q. And he wanted to have more time in which to engage in that hobby, didn't he?

A. Well, he never mentioned that. He was mostly—he was just tired of studying.

(Testimony of Bernard Clark.)

Q. Anyway, then it was your interest to have him earn as much money as he could in as few hours as he could, isn't that correct?

A. That's right.

Q. It could keep him, give him more time for school, and still more time for him to have some rest and relaxation so he wouldn't want to quit school, isn't that correct? A. That's right.

Q. Did Mr. Collins say that he would do everything he could to talk David into staying in school?

A. Sure.

Q. So, was Dave still attending school?

A. Yes.

Q. You, I believe, testified to a conversation with Mr. Clark on December 19, 1959, with Mr. Collins, is that correct? A. Yes.

Q. That conversation took place in a coffee shop, is that correct?

A. Yes. [122]

Q. And the first thing that was said in that conversation, I believe you testified to, was you started talking about the conversation that Mr. Collins had with David the day before regarding the union, is that right? A. Yes.

Q. That was the first thing that was said?

A. Yes.

Q. Is it true, Mr. Collins, that the first thing that was said was that Mr. Collins explain the trainee job to you? A. No.

Mr. Mark: I object. I think that the witness has

(Testimony of Bernard Clark.)

testified that the first thing he did say was something about the union.

Trial Examiner: Well, this is cross-examination.

Mr. Bakaly: This is cross-examination, Counsel.

Trial Examiner: He is asking, in effect, isn't it a fact that something else occurred; that's the tenor of the question.

Mr. Bakaly: That's right.

Q. (By Mr. Bakaly): And your answer is that that did not occur first?

A. No. The first conversation's going across the street there, that he was saying that he sure had been having trouble with keeping men in there, but—

Q. With what? [123]

A. With keeping men on the job on those district routes.

Q. Now, you are changing your testimony.

I want to know all of the conversations that you had with Mr. Collins on the 19th.

This is what you have been asked about.

The first part of the conversation, then, was a statement by Mr. Collins of the trainee jobs, isn't that correct? A. No.

Q. I believe you just said that he complained about the district managers' quitting and so forth, isn't that true?

A. No. He just complained about the district managers had been quitting on him.

Q. Isn't it also true that he said that this trainee program wasn't—was his way of permitting the confusion that resulted when district managers quit?

(Testimony of Bernard Clark.)

A. No. That come up later.

Q. You mean he just, out of the blue, Mr. Clark complained about the district managers quitting and that is all he said?

A. When we were walking across the street there, yes, the first part of the conversation when we sat down in the coffee shop and I told him about Dave joining the union.

Q. And up to this point, then, nothing had been said about the trainee program? A. No. [124]

Q. But it was your purpose to come down here and talk to Mr. Clark about the training program—

A. Mr. Collins—

Q. —Mr. Collins, wasn't it?

Was that your purpose in coming down there? Isn't that what your son called you down for?

A. That's right.

Q. And that wasn't said at all?

A. Not the very first time.

Q. The very first part of the conversation?

A. No, sir. I wanted to clear up the confusion about him joining the union or not.

Q. During this conversation in which you testified to at great length under direct examination, was anything said about this trainee job? A. Yes.

Q Were you told that the pay would be $55 a week for—

A. Yes.

Q. —for 33 to 35 hours, something like that?

A. He didn't mention any hours to me.

(Testimony of Bernard Clark.)

Q. You knew it would be less hours than what he was working for then?

A. No.

Q. You did not know that? A. No. [125]

Q. Dave did not tell you that?

A. No. I hadn't talked to him about that.

Q. Well, then, did you know that the rate of pay was a dollar sixty-seven an hour?

A. Later on, he said that's what it was.

But—

Q. During most of the conversation?

A. Yes, but most of the time he said it was $55 a week.

Q. All right.

Putting aside the question about the insurance and the mileage for the moment, you didn't complain about the amount of money of this trainee job, did you?

A. No.

Q. Your sole complaint was the high cost of car insurance and the mileage, isn't that correct?

A. Yes.

Q. Did you say anything about the fact that Dave could not keep his job as a fly boy at this conversation?

A. That he couldn't keep it?

Q. That's right.

A. No. I said he could keep it.

Q. Didn't Mr. Collins say to you at this conversation that—or hadn't Dave told you—that if he didn't take the training job, that it would be offered to somebody else who would start at the position of fly boy; didn't you know that [126] at the time?

(Testimony of Bernard Clark.)

A. No. He brought that out at the conversations. I hadn't talked with anyone about that,—

Trial Examiner: Mr. Clark—

A. —except on the phone.

Trial Examiner: —you came down there following a telephone conversation with David, isn't that correct?

The Witness: Yes.

Trial Examiner: To talk about the training job?

The Witness: Yes.

Trial Examiner: All right.

Q. (By Mr. Bakaly): Didn't you testify, or am I imagining something that you testified, that David told you that he was going to be let go and you came down to talk about it?

A. That was on that phone conversation Saturday—

Q. On the 19th? A. Yes, sir; Saturday.

Q. Yes. Well then, you did know that if he didn't take the trainee's job he was going to be let out at the fly boy job, didn't you?

A. His conversation over the phone was that he said they would come up with some kind of a trainee program.

If he didn't take it, they were going to let him go. Mr. Collins wanted to talk to me.

Q. So there was a conversation as to why he wouldn't—would [127] have to be let go and you were told by Mr. Collins that they would let him go because of the fact that the trainee program's first step was that the flyboy job and if Mr. Clark didn't want to go on the second step for which he was qualified, they

(Testimony of Bernard Clark.)

would hire somebody else for the first step of the fly boy job; wasn't that told you?

Mr. Mark: I will object. That question is a little unintelligible to me, and I have lost you.

Trial Examiner: Well, let's find out if Mr. Clark understood the question, then you can have it read in case you want to interpose an objection on that, Mr. Mark.

Can you understand that last question?

The Witness: Yes, I think so.

Trial Examiner: All right, will you read it for Mr. Mark's benefit, please?

(Record read.)

Mr. Mark: Was that told by Mr. Collins or Mr. Clark?

Earlier in there you have Mr. Collins.

Mr. Bakaly: Told to him by Collins.

That's the only other person concerned.

Trial Examiner: I think the very latter part of the question probably should read "The first step of the trainee program," rather than the ". . . first step of the fly boy job."

Mr. Bakaly: Fine, correct.

Q. (By Mr. Bakaly): I think you understand what I'm talking [128] about. A. Yes.

Q. Wasn't that said to you?

A. Do you want my reply to Mr. Collins now?

Trial Examiner: First of all, did Mr. Collins tell you that?

The Witness: No. In other words, the thing was Mr. Collins says that they would have the trainee pro-

(Testimony of Bernard Clark.)

gram, that they wanted to start him out as a fly boy and work up to being a district manager in circulation.

I pointed out to him at that time, the two jobs were not compatible; one was mail work and one was circulation, they didn't meet at all.

I mean, there is two different branches entirely there.

But knowing their work wouldn't quality you to go out and be a circular—distributor or increase circulation or anything like that.

Q. (By Mr. Bakaly): Didn't Mr. Clark say that all of his circulation managers knew that the work that David had done or learned it while they became circulation managers—didn't he tell you that?

A. No.

Q. Didn't he tell you that he wanted to have his district managers know the fly boy work?

A. Well, he thought it would be a good idea to know that. [129]

Q. This is not a big metropolitan newspaper, is it?

A. Yes.

Q. It is? A. Yes.

Q. A big metropolitan newspaper, with a big large mailroom staff?

A. Well, maybe we ought to bring the Daily Breeze up here and read their own publicity.

Mr. Bakaly: I don't want you to argue with me. I just want you to answer my questions.

Q. (By Mr. Bakaly): There was not a large mailroom staff at the Daily Breeze, was there?

A. No.

(Testimony of Bernard Clark.)

Q. There was one full-time mailroom employee, and that was your son, isn't that correct? A. Yes.

Q. Okay. He wasn't a full-time employee, was he?

A.. Well, my assumption—

Q. He wasn't working 24 hours a day?

A. Over forty hours a week.

Q. And overtime on Saturdays?

A. He was working seven days a week. Let's put it that way.

Trial Examiner: Well, again—

Q. (By Mr. Bakaly): Didn't you state to Mr.—excuse me. [130]

Did you have a question, Mr. Examiner?

I'm sorry.

Trial Examiner: We had that subject come up before, what is a full-time employee.

I think the record reflects the hours approximately ten working.

Mr. Bakaly: I think so.

Q. (By Mr. Bakaly): I take it that you did not state to Mr. Collins at this conversation on the 19th that you and David lined up a job in Los Angeles where Dave could work as a mailer two or three shifts a week and make more money than he could make at the Daily Breeze? A. No, we hadn't.

Q. Isn't it true that you stated that you would think it over over the weekend and that you would have Dave contact Mr. Collins on Monday?

A. No, no. I had made a definite statement then.

Q. You knew then on Saturday, the 19th, that Dave was going to be let off on Monday?

(Testimony of Bernard Clark.)

A. No, I was under the idea that he still had the job of being a fly boy there.

Q. Now, you say that you had some conversations with a representative of the ITU mailers' union prior to this, is that correct? A. Yes. [131]

Q. Isn't it true, Mr. Clark, that you went to—what is the man's name—Babio? A. Yes.

Q. You went to Mr. Babio in an effort to have him obtain a job for your son as a part-time mailer in Los Angeles? A. No.

Mr. Leathem: B-a-b-i-o-r.

Mr. Bakaly: B-a-b-i-o-r.

Q. (By Mr. Bakaly): What was the answer?

A. No.

Q. You said the reason you went to see Mr. Babior was to complain about the working conditions at the Daily Breeze? A. Yes.

Q. You had never complained to Howard Collins about these working conditions, though, had you?

A. Yes.

Q. You had? A. Yes.

Q. On what occasions?

A. On many times when he was over drinking coffee, I talked to him about those hours, long hours that they worked.

Q. On Saturday? A. Yes.

Mr. Bakaly: Just a moment, please.

Q. (By Mr. Bakaly): At one time, did Dave work both Wednesday [132] and Saturday nights?

A. Yes.

Q. And you came up—you came to Mr. Collins and

(Testimony of Bernard Clark.)

requested that he not work on Wednesday night because it was interfering with his school, isn't that correct?

A. I don't recall that.

Q. You don't recall that? A. No, I don't.

Q. You recall your complaining about the long hours on Saturday, but you don't recall about complaining about working Wednesday night?

A. No, I don't recall that.

Q. Isn't it true that you didn't complain about the length of hours that Dave was working at all?

A. No. I did complain.

Q. To Mr. Collins? A. Yes.

Q. And he did nothing about it?

A. No. He said, "Well, he is going to work on it."

Q. When was this conversation?

A. Well, it started right shortly after they went on the Sunday paper. When they started working the seven days a week.

Q. When was that?

A. That was approximately six months ago. [133]

Q. And nothing was done by Mr. Collins about it in six months? A. No.

Q. And you continued having coffee with him and so forth? A. Sure.

Q. Continued being friendly with him?

A. Sure.

Q. Did you discuss with Mr. Collins on the 19th the fact that the new job would take Dave off of Saturday night work, the trainee job? A. No.

Q. Nothing was said about that? A. No.

Q. Did you have any conversations with any repré-

(Testimony of Bernard Clark.)

sentatives of the Mailers' Union during the periods from December 19th to noon on December 21, 1959?

A. Well, that's what—

Trial Examiner: The 19th would be the Saturday that you talked to Mr. Collins, and the 21st would be the following Monday?

The Witness: No, I didn't talk to them at all.

Mr. Bakaly: I have no further questions at this time.

Redirect Examination

Q. (By Mr. Mark): Mr. Clark, when did David begin working late on Saturday nights?

A. When they went on the—had the Sunday paper.

Q. When was this? [134]

Approximately six months before.

Q. Approximately six months before. Was David working on Sunday nights at that time?

A. No, no. He wasn't working Wednesday nights.

Q. Do you recall how long before he had stopped working on Wednesday nights?

A. No, I can't, really. I'm sorry.

Q. He was not working on Wednesday night at the time they instituted the Sunday edition at the time that he was putting in these long hours on Saturday?

A. No.

Q. In regard to the insurance, does Dave contribute money toward the upkeep of the insurance?

A. He pays for it, yes.

Q. So, actually, when you stated that you paid for the insurance, you mean the insurance was in your name? A. Yes.

(Testimony of Bernard Clark.)

Q. The moneys to pay for it came from Dave's salary? A. Yes.

Q. You say that you had coffee with Mr. Collins many of the times and have talked to him many other times about keeping Dave at the South Bay Daily Breeze? A. Yes.

Q. Was there any mention made about the trainee position at any time prior to this? [135]

A. No.

Q. When I am talking about "this," I mean December 19th. A. Oh.

Q. In regard to Mr. Collins' complaining about the turnover in district managers, you say that this occurred in the course of transit from the Daily Breeze Building over to the Spanish Inn, is that correct?

A. Yes.

Q. And that immediately upon entering the Spanish Inn you started talking about the union, is this correct?

A. Yes.

Q. And you did not bring up the trainee position until later in the conversation? A. That's right.

Mr. Mark: I have no further question.

Recross-Examination

Q. (By Mr. Bakaly): Does Dave also pay you for the car? A. Yes.

Q. Pay you so much a month? A. Yes.

Q. Has he paid you completely for it yet?

A. No.

Q. Are you the legal owner of the car as well as the registered owner? A. No. [136]

Q. Who pays the legal owner; you or David?

(Testimony of Bernard Clark.)

A. Well, I send a check over there.

He doesn't have a checking account, so I send a check for it.

Q. But he pays you the amount of the payment to the legal owner? A. Yes.

Q. Isn't it true that the car is in your name so that you will be able to get, among other things, lower insurance rates?

A. There is no reduction on that insurance rate but it's a teenage boy driving.

Q. Even though the car is in your name?

A. That's right.

Mr. Bakaly: No further questions.

Trial Examiner: Even though you have two cars?

The Witness: No, there is still no reduction.

I was inquiring about that. I was hoping.

Trial Examiner: Just a minute.

Do you have any other questions?

Mr. Mark: I have no more questions.

Trial Examiner: Do you intend to call more witnesses?

Mr. Mark: Well, Mr. Trial Examiner—

Trial Examiner: Excuse me. The reason I asked, I'll tell you in advance. [137]

Implicit in this record, probably, is the question of union jurisdiction.

Mr. Clark here, has been a member of the ITU for a long time, and unless you are going to develop it, I was going to find out whether he knew what the practice in this area is with respect to what type of work the mailers' division of the ITU includes.

(Testimony of Bernard Clark.)

Mr. Mark: No. That particular point I wasn't going to go into.

Trial Examiner: I beg your pardon.

Mr. Mark: I hadn't planned on going into that point or to call witnesses on it.

Trial Examiner: Well, I regard it as essential in making—even to make a prima facie case to ascertain that, the aspect of it; otherwise I don't see how there is any basis for—on the evidence that I have heard so far for finding discriminatory motivation.

Mr. Mark: May I have just a few minutes?

Trial Examiner: Surely.

(Discussion off the record.)

Trial Examiner: On the record.

Q. (By Mr. Mark): Mr. Clark, you are a member of what union? A. ITU, No. 174.

Q. That's a printer union? A. Yes. [138]

Q. Does your union include among its constituents and members those people who work in mailing rooms, mailing departments in newspapers or publications?

Mr. Bakaly: You mean his local union or the international?

Mr. Mark: His local.

The Witness: No, not the local.

We have two different locals, but we have one international body.

Q. (By Mr. Mark): Under whose jurisdiction does the mailing room come?

A. Under the mailers.

Mr. Bakaly: I will object to that. This witness is not competent to answer that question.

(Testimony of Bernard Clark.)

There is no foundaiton that he has any familiarity with the union contracts or any official union or any similar capacity; no foundation laid for that kind of a question. He is just an employee, a printer.

Trial Examiner: Perhaps and perhaps not.

Mr. Bakaly: As far as the record now stands, that's all he is.

I'm sorry, yes; perhaps he does.

Trial Examiner: I wonder if you would probe the question of Mr. Clark's familiarity with the composition of the people that are in the mailers' department of the ITU or the mailers' [139] local, if he knows, in this area.

Q. (By Mr. Mark): Mr. Clark, are you familiar with the type of personnel who come under the mailers' union jurisdiction? A. Yes.

Mr. Bakaly: I would like to take the witness on voir dire, then, Mr. Examiner.

I would like to find out the basis for this familiarity. If the counsel for the general counsel is not going to lay a foundation, I would like to lay it or try to lay it.

Trial Examiner: Well, except in the case the document, we usually have anticipatory cross-examination on voir dire of this type of a situation.

I do think that—

Mr. Bakaly: Maybe you would ask the questions, then.

I don't care who asks them.

Apparently the general counsel doesn't want to ask them.

(Testimony of Bernard Clark.)

I want to know the basis for his familiarity. This is just a conclusion.

Trial Examiner: If Mr. Mark will indulge me, I will ask Mr. Clark a few questions at this point.

Examination

Q. (By Mr. Kennedy): You have been a member of the ITU Printers' Union for how long?

A. Twenty-one years.

Q. How long have you worked in the Southern California area? [140]

A. All but about three years of that.

Q. Is there more than one local in the Southern California area with more than one Printers' Union, I mean Printers' local?

A. Well, 174 covers greater Los Angeles.

Q. And that's the union that you are a member of?

A. That is the one I belong to.

Q. Does that include Redondo Beach?

A. No, Redondo Beach.

It belongs to the San Pedro local. [141]

Q. In the course of your employment as a printer, do you work in plants where there are employees who are members of the I. T. U. but are members of the Mailers Local? A. Yes.

Mr. Bakaly: Could I have the question, please? I'm sorry.

It's hard to hear.

Trial Examiner: I will speak louder.

Will you read it.

(Record read.)

(Testimony of Bernard Clark.)

Q. (By Trial Examiner): Where do you work now? I know you told me, but it escapes me.

A. With Rodgers and McDonald.

Q. Do they have members of Mailers Union No. 9 working? A. Yes.

Mr. Bakaly: Working where?

The Witness: At Rodgers and McDonald, where I work.

Q. (By Trial Examiner): Where is that located?

A. 2621 West 54th Street.

Q. In Los Angeles?

A. In Los Angeles.

Q. Do you of your own personal knowledge whether the Mailers Union No. 9 of the I. T. U. has the territory including Redondo Beach and more specifically the area where this South Bay Daily Breeze is located? [142]

A. It's my understanding that Local 9 has jurisdiction in that area.

Mr. Bakaly: I move we strike it.

Q. (By Trial Examiner): On what do you base that understanding?

A. Well, on the conversations that I had with the mailers.

Q. Do you know of any plans or printing—of publishing or printing facilities in that area where Mailers Union No. 9 has members in the area—and then we will have to get that more definite—but I'll ask you more generally where the plant of the Daily Breeze is located?

A. Well, I understand that they have two union

(Testimony of Bernard Clark.)

mailers that work there on Wednesday nights—that's been told to me—

Mr. Bakaly: Under a union contract?

A. The Witness: Pardon?

Mr. Bakaly: Under a union contract with the Daily Breeze?

The Witness: I don't know if they have a contract or not.

Mr. Bakaly: That was the question.

Trial Examiner: Well, I don't think—That can be struck because it doesn't appear at least as of yet that your personal knowledge of it is based on anything more than a general understanding. Am I right?

The Witness: That's all.

Trial Examiner: That's all right. [143]

Q. (By Trial Examiner): In the plant where you work, do any of the people that belong to the Mailers Union work outside of the plant?

A. Oh, I couldn't—I couldn't state.

Q. You just don't know?

A. I don't know that.

Trial Examiner: All right. Well, I'm aware of the fact that there has been some preliminary testimony in the record that young Mr. Clark gave suggesting to me, at least, that these people that did the outside distributing work on occasion work inside the plant, too.

I think the record arguably could support that conclusion. It may not be correct.

So I suggest, Mr. Mark, that if there is a qualified union representative here that is familiar with local 9's

(Testimony of Bernard Clark.)

composition of its members, that that might be the best way to develop it.

Mr. Bakaly: I don't see any reason to fool around. We have a man here who is an officer of the local.

Mr. Mark: All right.

Trial Examiner: All right, Mr. Clark.

No more questions now of Mr. Clark?

Mr. Bakaly: No.

Mr. Mark: None here.

Trial Examiner: All right, thank you. [144]

(Witness excused.)

Mr. Mark: The General Counsel would like to call Mr. Leathem.

FRED MALACHY LEATHEM

a witness called by and on behalf of the General Counsel having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Mark): Mr. Leathem, would you state your full name, please?

A. Fred Malachy Leathem, M-a-l-a-c-h-y L-e-a-t-h-e-m.

Q. Mr. Leathem, what is your occupation?

A. I am a mailer.

Q. Are you a member of Local 9 of the Los Angeles Mailers Union, I. T. U.?

A. Yes.

Q. Do you hold any position with that Local Mailers Union?

(Testimony of Fred Malachy Leathem.)

A. Yes. I'm chairman of the organization committee and also member of the scale committee.

Q. Of the scale committee?

A. Of the scale committee.

Q. In the course of discharging your duties as an official of the union, do you execute contracts or, let's say, negotiate contracts? A. Yes.

Q. —with employers regarding mail room personnel? [145] A. Yes, sir.

Q. Do you have any contracts in effect with any publishing companies in the Los Angeles area?

A. Yes, sir.

Q. Do you have any such contracts in effect with any publishing companies in the Redondo Beach area?

A. We have a contract with the Starbuck and the South Bay Mailing Company.

Mr. Bakaly: That is a publisher, is it?

The Witness: No. That is a job shop mailer.

Also, the Long Beach Telegraph, which is close by; we have a contract with them.

Q. (By Mr. Mark): Does the jurisdiction of your union take in the geographical limitations of Redondo Beach, in that area?

A. Yes, it does.

Mr. Mark: May I have this marked as G. C. Exhibit No. 3 for identification?

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 3 for identification.)

Q. (By Mr. Mark): What type of personnel come under the jurisdiction of your union?

(Testimony of Fred Malachy Leathem.)

A. Mailers.

Q. What type of work do they do? [146]

A. A mailer does all sorts of work in a newspaper plant between the time that the newspaper is printed and the time it is delivered to the dealers' trucks.

Q. I hand you General Counsel's Exhibit No. 3, which is a newspaper agreement between the Los Angeles Mailers Union No. 9 and the Hillbro Newspaper Printing Company.

Now, this is an expired agreement. It's dated effective September 1, 1957, to August 31, 1959.

I call particular attention to Section 17 of this agreement and ask you to read that, please.

Mr. Bakaly: To himself?

Trial Examiner: Yes, I assume so.

Mr. Mark: To himself.

The Witness: Oh, pardon me.

Q. (By Mr. Mark): In regard to this particular agreement, were you involved in any way in any negotiations of this agreement?

A. I was not involved in the negotiations of that particular agreement.

At the present time I am involved in the negotiation of the succeeding agreement to that and at the present time Mailers Union. No. 9 is working under this contract with the publishers of the Southern California area within our jurisdiction.

Mr. Bakaly: I object to that; move to strike that. [147]

Whatever the jurisdiction between some other employer and the union is is not binding upon this response.

(Testimony of Fred Malachy Leathem.)

Trial Examiner: Well,—

Mr. Bakaly: He has testified to his opinion, which I suppose is competent for what it's worth, that they think there is work in their jurisdiction.

Jurisdiction is something that is determined by a contract between an employer and a union.

Trial Examiner: That's the trouble with me, Mr. Mark.

What any other employer and Local 9 did wouldn't necessarily, certainly by Federal statutes we are concerned with here, be controlling.

So what we are really speaking for, I think, is the probabilities that would stem from the past practice of the Mailers Union or which would perhaps be reflected within their own constitution as to what type of work—

Mr. Bakaly: Of course, that would only be their opinion—

Trial Examiner: That's correct.

Mr. Bakaly: —and not binding on the Respondent.

Trial Examiner: Well, I would regard it as appropriate evidence on the issues that we have here.

Do you have a copy of your constitution with you, Mr. Leathem?

The Witness: No, I'm sorry, I don't, sir. [148]

Mr. Mark: Is it possible for you to procure a copy of that, the constitution?

The Witness: Yes.

Trial Examiner: I think we should probably have that, because Respondent should certainly have an opportunity to read it, particularly in view of the ques-

(Testimony of Fred Malachy Leathem.)

tions that I'm going to address to Mr. Leathem, and so that when we meet again if we can have that as well as the insurance policy of Mr. Clark—

Mr. Mark: Well, in view of the fact that I don't personally have—I haven't taken a look at the constitution involved, I would like to take a look at it myself.

Trial Examiner: Certainly, you may.

But I think that possibly it can be no more a qualifier as to the testimony that Mr. Leathem is in a position to give, in my judgment, as being a participant in this type of union organization.

Now, if you have no questions immediately, I would like to put two or three questions to Mr. Leathem.

Mr. Mark: I would like—I had not anticipated at this time calling Mr. Leathem, and for this reason, I would like to take time to at least bring questions for my own self so we can speed these things up.

Trial Examiner: Mine are very simple, and I think in view of the chain of events, that it would not be inappropriate [149] for me to ask the questions at this time while he is here.

Examination

Q. (By the Trial Examiner): Having in mind your opinion with respect to the jurisdiction that it encompasses, the work, from the time the printed material leaves the press until its put on the dealer's truck, having in mind that you have already told us that, first, does your organization represent anyone else that does work other than that would be from the time the papers or printed material comes off the press until it goes on the truck? A. No.

(Testimony of Fred Malachy Leathem.)

Q. Do you represent—and by you I mean your local No. 9 of the Mailers Union—do you represent individuals who do work that is only partially within that definition of your jurisdiction that you have given? A. No.

Q. Do you represent any part-time employees that do nothing but that work? A. Yes.

Q. Assuming that—

Mr. Bakaly: I take it that part-time bit assumes that the part-time employees have a sufficient connection with the bargaining unit to be included within it for the purposes for a representation proceeding?

Trial Examiner: Well, I'm not sure exactly what—[150]

Mr. Bakaly: I think that is—I think I know the problem that is troubling the Examiner here.

That's a relevant fact to it.

Trial Examiner: I'm not certain that I see the necessary relevance of it, but probably it's the last thing that I'll go into and then you can go into it, Mr. Bakaly.

Q. (By the Trial Examiner): Have you in the past been aware of any position taken by your union with respect to any individuals who did part-time work which we would call Mailer's work and part-time work which would not be mailer's work for the same employer? A. No.

Q. You have not been confronted with that situation? A. No.

Q. I take it it's an all or nothing proposition?

A. Yes, it is.

(Testimony of Fred Malachy Leathem.)

We, if I may say so, I would perhaps by elaborating a little bit, I could clarify the situation.

Trial Examiner: I'll be glad to listen.

The Witness: Well, we have contracts with numerous small newspapers similar to the Breeze, for example, the Huntington Park Signal, the Arcadia Tribune, the Garden Grove Daily News, and in many instances we have signed contracts where the person working for these newspapers may work one or perhaps two days per week in the mail room. [151]

Perhaps they do not have a seven-day publication.

Some of them have two-day publications. However, they are employed exclusively on mailing room work. By that I mean, again, they handle all the necessary mailing work from the time the publication leaves the press until it is delivered to the tailgate of the truck.

Q. (By the Trial Examiner): Now, so that I'll be clear, these people that you have used as examples only work two days a week?

A. That's correct.

Q. They don't work in some other department of the publication during any other time? A. No.

Q. So you don't have that situation that you have been exposed to? A. No.

Trial Examiner: Well, I think that it would be appropriate that the respondent have an opportunity to examine the constitution of the International and the Local when we resume. Could you make that available, Mr. Leatham?

The Witness: Yes.

(Testimony of Fred Malachy Leathem.)

Trial Examiner: I have no more questions right now.

Mr. Bakaly: Will Mr. Leatham be available when we resume?

The Witness: Yes, I will be available.

Mr. Bakaly: Maybe it would save some time by asking a foundation question or two now and perhaps I might reserve my [152] examination until when he returns again.

There is no point in hitting him twice, but first I want to find out.

Cross-Examination

Q. (By Mr. Bakaly): Have you made any statements to the National Labor Relations Board concerning this David Clark charge? A. No.

Q. Any written statements of any kind?

A. No.

Mr. Bakaly: I think I will reserve on it, if I may, until he comes back, until I can take a look at the constitution.

Trial Examiner: Yes.

Mr. Bakaly: I have a problem here. I know we want to quit at close to 4:00 o'clock.

I would like to, if this is all the evidence that you have now, I would like to, before we adjourn, to put on, out of order, a short witness who then may be permanently excused.

He is one of the district managers at the Breeze, and his presence here and Mr. Collins' presence here both disrupt somewhat the operations of the paper.

(Testimony of Fred Malachy Leathem.)

As long as we are going to have another day, I would like to get him out of the way, if we could?

Trial Examiner: I won't ask the General Counsel to formalize it, but maybe he has, in effect, rested, in any [153] event.

Maybe it may not be out of order so we will leave that question open until we resume.

Mr. Mark: Why don't we leave that question until we resume?

Trial Examiner: Yes. Thank you, Mr. Leatham.

(Witness excused.)

Mr. Bakaly: I will call Mr. Gagnon.

ERNEST LIONEL GAGNON

a witness called by and on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

Mr. Bakaly: I would like to indicate that Mr. Gagnon is being called out of order on my case.

He would normally follow Mr. Collins.

Trial Examiner: All right, fine.

Direct Examination

Q. (By Mr. Bakaly): What is your name?

A. Ernest L. Gagnon, G-a-g-n-o-n.

Q. What is your occupation, Mr. Gagnon, and by whom are you employed?

A. My occupation is district manager and I'm employed by the South Bay Daily Breeze.

Q. When were you first employed by the South Bay Daily Breeze?

(Testimony of Ernest Lionel Gagnon.)

A. About the first week of May in 1959.

Q. Have you always been a district manager? [154]

A. Yes.

Q. Were you employed as a district manager?

A. Yes.

Q. Do you know Dave Clark?

A. Yes, I do.

Q. How long have you known Dave Clark?

A. Since I've worked for the Breeze.

Q. What is the character of your relationship with David Clark?

A. Well, we work together when the press starts. He is the flyboy, when the press starts, why I'm, oh— I won't call it a foreman, but I mean just to see that everything is going out, pick up all the supplies and so forth and make sure that everything is running smoothly.

Q. You don't have the power to hire or fire?

A. No, I don't, no.

Q. Or to effectively recommend hire or fire, do you?

A. That I don't know. I don't know.

It all depends—

Q. It has never arisen? A. No.

Q. Did David Clark prior to December 21, 1959, own a pickup truck?

A. Yes, he did.

Q. Will you tell us whether or not he on occasions prior to [155] that date helped out the district managers by using his pickup truck?

A. He is very helpful on that.

(Testimony of Ernest Lionel Gagnon.)

We get in a jam or the late press run, and to facilitate to get all the papers out to the carriers as soon as possible, why he would drop some of them off himself and do that wherever it was necessary.

Q. Were you present at a conversation on December 19, 1959, between David Clark, Harold Collins, and yourself? A. Yes, I was.

Q. Was anyone else present besides the three of you? A. No.

Q. Where did the conversation take place?

A. Across the street at the Spanish Inn.

Q. What was said by Mr. Collins and what was said by Mr. Clark?

A. Well, Mr. Collins offered Dave the job as a trainee and explained the job to him, explained the rate of pay, how he had arrived at the rate of pay, which was—well—and explained the duties, what he would be doing, what he had done previously to be able to go into the training program when he had done the flyboy job and how it helped out the district managers on different occasions, you know, in dropping bundles and taking care of everything; that he would be the really best man to come in as a trainee and get somebody else for the flyboy, so [156] he would learn also.

Q. Would you tell us whether or not Dave Clark said that he couldn't take the job because the car insurance would be too expensive?

A. No. He said he wanted to talk to his father, talk it over with his father.

Q. Would you tell us whether or not Mr. Collins

(Testimony of Ernest Lionel Gagnon.)

stated that if he didn't take the job he would—the job as trainee, they would have to bring in somebody else to be flyboy?

A.. I would have to stop and think.

I'm quite sure, but I am not positive.

I don't really know for sure just which way it went.

It's hard to try to remember everything.

Q. Do you recall whether or not Dave Clark stated on this occasion that he wanted to remain as a flyboy?

A. No. I don't remember, no.

Q. You don't remember? A. No.

Q. Now, was there a conversation between you and Dave Clark on December 21, 1959?

A. Yes.

Q. Who was present?

A. There was Collins and Dave Clark and myself.

Q. Where did this conversation take place?

A. In Mr. Collins' office. [157]

Q. What was said by Mr. Collins and what was said by Mr. Clark and yourself?

A. Again, Mr. Collins explained the job as a trainee and I think—I thought it was a darn good deal myself, but it has nothing to do with it, but anyway—

Trial Examiner: You are right.

The Witness: —I thought so. It was a real good deal for him.

Well, anyway, Howard and Dave were talking, mainly Howard, trying to explain the job over again, actually the help they would get.

One thing I remember is that Dave was studying psychology or business psychology, something like that,

(Testimony of Ernest Lionel Gagnon.)

in that field, and I felt that with the training that he would be getting, the contacts he would be making—

Mr. Mark: I would like to interrupt here. I'm not sure whether he is repeating the conversation, which is what he was asked for, or whether he is giving his interpretation of what Mr. Collins' actions were at this time.

Q. (By Mr. Bakaly): Did Mr. Collins state this, or are these your feelings?

Trial Examiner: Who said what, not what you thought.

The Witness: Okay.

Q. (By Mr. Bakaly): We want what was said.

A. Well, let's go back to saying that he explained the training [158] program again to Dave and, again, how he arrived at the hours and so forth.

My own feelings, I think, would come in as to helping out—

Mr. Bakaly: Not unless you've made a statement—

The Witness: Yes.

Mr. Bakaly: —to that effect.

The Witness: I don't remember. I really don't.

The main thing—

Q. (By Mr. Bakaly): What did Dave say, if anything?

A. Dave said that he couldn't take the job, and then Dave also wanted to know if he should stay to help train the new flyboy, and Howard didn't feel that he would have to, and we—

Q. Dave Clark offered to say on and train the new flyboy? A. Yes, he did, but—

(Testimony of Ernest Lionel Gagnon.)

Q. Tell us what, if anything, was said about Dave's getting employment in Los Angeles?

A. Well, just from hearing the way he was talking, he was going to work—

Mr. Mark: I will object to that.

Trial Examiner: Yes.

The Witness: I was gathering that from the way he was talking.

Q. (By Mr. Bakaly): Try the best you can to tell us what was said.

Trial Examiner: It doesn't have to be exact, but repeat it. [159]

Q. (By Mr. Bakaly): Tell us what in effect was said.

Trial Examiner: You understand that right now we are on the subject of what if anything Dave Clark said about employment in Los Angeles on this morning, Monday morning, when you were in Mr. Collins' office?

The Witness: Yes.

Trial Examiner: Now, what do you recall of what was said by Dave Clark on this subject?

The Witness: There was, as far as I can remember, I don't think he said anything definite that he had a job, but I can only just—again, I'll have to say it this way: Just the way he was talking, that he was all set, he was going to work.

That's again—

Mr. Mark: I am going to move to strike that.

Trial Examiner: It may be struck.

Mr. Bakaly: Well,—

Trial Examiner: You are giving us your interpreta-

(Testimony of Ernest Lionel Gagnon.)

tion of it and which, perhaps, makes sense, except we are—we have to try to do a little better than that here, if possible.

The Witness: All right.

Trial Examiner: What we are looking for, if there was anything said by Dave Clark on that subject of getting work in Los Angeles, what do you remember about it?

The Witness: If I remember, he was looking for—he wanted more—[160]

Trial Examiner: This is what Dave Clark was saying to—

The Witness: Yes.

Trial Examiner: Tell us what he was telling you and Mr. Collins or speaking, in any event, on that occasion without that subject of getting work in Los Angeles.

The Witness: Doggone it. I can't quote.

I mean, it's just something that—

Trial Examiner: Maybe you misunderstand.

We are not asking that you quote or that you repeat word for word, but that if you do have some recollection of him making some statement or comment about getting work in Los Angeles, we want your best recollection of what he said on that subject.

Do you understand?

The Witness: Yes. That's what I am trying to come up with.

But like I said, from what I remember—

Trial Examiner: First of all, do you remember him saying something about the subject?

(Testimony of Ernest Lionel Gagnon.)

The Witness: Yes. He did say—

Trial Examiner: All right, all right. Now, so you remember him saying something about possibly getting work in Los Angeles?

The Witness: Yes.

Trial Examiner: Now, tell us as closely as you can what he said. [161]

The Witness: That he would be working just a couple of nights a week and I believe he was making $24.00 a night, which would give him more time for his studies, it's words like that; anyways, it's in that—

Trial Examiner: In substance what Dave Clark said on that morning?

The Witness: Yes.

Trial Examiner: All right.

Q. (By Mr. Bakaly): I think inadvertently the Examiner put in a word when he said about possibly getting the work in Los Angeles, and if I might get a chance to lead the witness here a little bit.

Did you understand Dave Clark to say that he either had or was making arrangements to obtain such employment in Los Angeles?

Do you understand that?

A. Yes. From what I can remember or—of the conversation or the impression that it left on me on the conversation, is that he was set, he was ready to go to work.

Mr. Mark: I'm going to move to strike that.

The Witness: I can't say it in words.

Mr. Bakaly: Just a minute. I think that is proper, Mr. Examiner. This witness has a little difficulty here,

(Testimony of Ernest Lionel Gagnon.)

I think, in understanding exactly what we are saying, and he is characterizing both what Clark said, what Collins said and the boy's actions, so I think it's proper testimony.

Trial Examiner: Well, the difficulty with it is that, as we all know, we can get a variety of impressions from the same comment, and that's why, as a rule, a witness doesn't testify to his impressions.

Now, it may be just a question of semantics, which it probably is.

Mr. Bakaly: I think it is.

Trial Examiner: But I think that in the form that answer was given, I feel constrained now to grant the motion to strike that. [163]

Q. (By Mr. Bakaly): Did Clark say in words or effect that he could work in— A. Yes.

Q. —Los Angeles? A. In Los Angeles, yes.

Q. Did he say in words or effect that he had been making an effort previously to obtain work in Los Angeles?

Mr. Mark: Objection. That is leading him.

Trial Examiner: Well, it is leading him.

Mr. Bakaly: There is no question about that.

Trial Examiner: We have got to a point now where I think it's properly indicated to have such a question, at least in my judgment, which may be erroneous, so the objection is overruled.

Mr. Bakaly: Could you understand the question?

The Witness: Would you repeat it?

Mr. Bakaly: Read it, please, Mr. Reporter?

(Record read.)

(Testimony of Ernest Lionel Gagnon.)

The Witness: No. I don't think so.

Q. (By Mr. Bakaly): Did he say in words or in effect—I believe you testified to this—you said he could get work in Los Angeles? A. Yes.

Q. Did he say that he—In words or effect, tell us whether or not he said that he wanted to remain on as a fly boy? [164]

A. No. That was never brought up. Like I said before, he was just wanting to know if the—if he should stay on to train the other fly boy, but as for him to stay, no, he never said anything about it.

Q. Do you get a mileage allowance as a district manager? A. Yes, I do.

Q. How much allowance do you get per week and how many miles do you travel for the company per week?

A. Well, I get $15.00 a week mileage allowance, and my district is eight miles a day, about eight miles a day; and then I would be dropping off special papers, going back, you know, to—maybe somebody didn't get one paper or work like that.

Q. For how many miles approximately is that?

A. That is for 48 miles per week.

Q. You get $15.00 allowance for that?

A. Yes.

Q. Does this adequately compensate you for the expenses, considering depreciation, cost of insurance, if any, et cetera?

A. It certainly does; more than that.

Q. Have you in your discussions with other district managers ever heard any of them complain about

(Testimony of Ernest Lionel Gagnon.)

the size of the mileage allowance that they were getting?

A. No. They are all making real well on it. They are not hurting a bit. [165]

Mr. Bakaly: May I have just a moment, please. May I have this marked as Respondent's next in order for identification.

(Thereupon the document above referred to was marked as Respondent's Exhibit No. 3 for identification.)

Q. (By Mr. Bakaly): Mr. Gagnon, I show you what has been marked as Respondent's Exhibit No. 3 and ask you if this is the statement which was signed by you on or about the fifth day of February, 1960?

A. Yes, it is.

Q. I would like to direct your attention to—

Mr. Mark: Excuse me. I would like to just object here, not to hold you up. I would just like to know whether or not you are attempting to refresh the witness' recollection, because I'm not sure if we have exhausted that or what—

Mr. Bakaly: I am going back to the conversation on the 21st and I think we have had difficulty and we exhausted this, and now I want to refresh the witness' recollection as to what he said on the fifth of February about this conversation on the 21st.

Trial Examiner: All right.

Q. (By Mr. Bakaly): I would like you to read to yourself the paragraph here beginning "On . . ."

A. All right.

Q. Now, I ask you—[166]

(Testimony of Ernest Lionel Gagnon.)

Mr. Mark: May I take a look at that, please?

Mr. Bakaly: Surely.

Q. (By Mr. Bakaly): I want to ask you whether or not your recollection has now been refreshed as to what Dave Clark said about a job which he had in Los Angeles?

A. Yes. He had something else in mind at that time, so—

Q. Do you recall him saying the words that he had something else in mind? A. Yes.

Mr. Bakaly: No further questions.

Cross-Examination

Q. (By Mr. Mark): Mr. Gagnon, you say you were hired back in May of 1959?

A. That's right.

Q. Did you take any training in the course of your job or position as district manager in the mailroom at all?

A. No. Mr. Daines, D-a-i-n-e-s, really is the one that trained me while I was working. He helped me out all he could.

Q. Did you undergo training in the fly boy job or the mailroom? A. He taught me that, yes.

Q. Mr. Gagnon, were you present all through the conversation on Monday, December 21st, between—

A. Yes. [167]

Q. Prior to this, you were not present at the time that Mr. Clark testified that you were called into the office after Mr. Clark and Mr. Collins had been talking for a while, isn't that correct?

A. No, it isn't, because I'm the one who went down

(Testimony of Ernest Lionel Gagnon.)

to the mailroom to get Dave, and we walked in together.

Q. Did you at any time leave the office?

A. No, I didn't.

Q. How large is the office?

A. Oh, twelve by twelve.

Q. Did you stray from the immediate area of conversation at any time? A. No.

Q. Were you listening to the conversation throughout the entire period? A. I feel I was, yes.

Q. And after Mr. Collins had asked Dave whether he wanted the training position, what did Dave say?

A. Well, that he did have something else in mind and that he was—wanted to know then if he should stay and train the new fly boy.

Q. Isn't it a fact that Mr. Collins asked Dave whether he wanted the training position and Dave replied that he did not, and that thereafter Dave asked Mr. Collins whether he wanted him to stick around? [168]

Mr. Bakaly: I think that is about two questions; there may be three, Mr. Examiner; compound; objection.

Trial Examiner: Break it down, please.

Mr. Mark: All right.

Q. (By Mr. Mark): Isn't it a fact that the conversation between Mr. Collins and Clark took this order:

First of all, Mr. Collins asked Dave whether he wanted the training position, is this correct?

A. Yes, I believe so.

(Testimony of Ernest Lionel Gagnon.)

Q. And then Dave replied that he did not?

A. That he had something else in mind, that he did not want the job.

Q. And that thereafter, Mr. Collins—or Dave asked Mr. Collins whether or not he wanted him to stick around?

A. Whether he should stay and train the new fly boy.

Q. Right. And Mr. Collins replied no?

A. That he didn't feel it would be necessary, that I would be down there to train him, because I knew what was to be expected of the fly boy.

Q. Isn't it a fact that at this time Mr. Collins asked Dave what he was going to do and that Dave, in reply to this, said, "Well, I might be able to get a job in Los Angeles"?

Mr. Bakaly: This is two questions, again, Mr. Examiner.

Mr. Mark: I don't think that is unintelligible.

Mr. Bakaly: He ought to break it down. He is asking him [169] two or three different things, whether it occurred after this or that, and then what was said.

Trial Examiner: I think in view of the preceding question, it can be answered yes or no.

The Witness: Would you state that again?

Mr. Bakaly: Would you read it again, please.

(Record read.)

The Witness: No, I don't think so, no.

I think that had been taken care of.

Trial Examiner: All right.

(Testimony of Ernest Lionel Gagnon.)

Q. (By Mr. Mark): Who were you hired by at the South Bay Daily Breeze?

A. Mr. Collins hired me.

Q. What had you been doing prior to that?

A. Machine designer, machine tool designer.

Q. Had you known Mr. Collins long before you came to work for the paper? A. About a year.

Q. Was it a personal relationship?

A. We were neighbors.

Q. Live next door to Mr. Collins? A. Yes.

Q. Mr. Collins hired you? A. Yes.

Q. Do you still live next door to Mr. Collins? [170]

A. Yes.

Q. Have you talked over this case with Mr. Collins?

A. There is not much to talk about. We have talked about it.

Q. Have you talked over your conversation on December 21st with Mr. Collins?

A. More than likely, yes.

Q. Has Mr. Collins told you his interpretation of that conversation?

A. I don't think so. It was just general talk, like anything else.

Mr. Mark: I have no further questions.

Mr. Bakaly: No.

Trial Examiner: All right. Thank you. You are excused.

(Witness excused.)

Mr. Bakaly: May he be permanently excused, Mr. Examiner?

Mr. Mark: I have no objection.

Trial Examiner: Yes. We will stand adjourned now until 10:00 o'clock Thursday morning.

(Whereupon, at 4:20 o'clock, p.m., Tuesday, March 15, 1960, the hearing in the above-entitled matter was adjourned to Thursday, March 17, 1960, at 10:00 o'clock a.m.) [171]

Trial Examiner Kennedy: We will be on the record.

Mr. Mark, have you rested the General Counsel's case?

Mr. Mark: No, I haven't, Mr. Trial Examiner.

To meet the Trial Examiner's request, I have obtained a copy of the jurisdiction involved in the Mailers Union No. 9 Constitution, and the representative of the Mailers Union has handed me the copy of the Constitution, on which the last revision was 1956, and the article we are interested in relating to jursidiction, the current article dealing with that, is Article 5.

I would like to see whether we can get a stipulation and have this particular matter received.

At this time I should also like to withdraw General Counsel's Exhibit No. 3, which I believe was the contract between Mailers Union No. 9 and The Hillbro Publishing Company.

Mr. Bakaly: May I see that? That's the contract I want to see anyway.

Mr. Mark: Certainly.

Trial Examiner: As I recall, General Counsel's No. 3 was offered and not received; is that correct?

Mr. Mark: That is correct. I believe it was offered but not received.

Mr. Bakaly: It was just marked, wasn't it? [174]

Mr. Mark: It was just marked, that is correct.

Mr. Bakaly: I don't think we got around to—

You represent this is a copy of the contract, and I am going to check here.

Respondents object to the withdrawal of this document from identification and request that we be allowed to cross-examine the witness on the basis of the document. We have not had the right to cross-examine the witness who identified the document. I feel that since the contract would be of assistance in cross-examining, it should not be withdrawn.

Trial Examiner: The only thing that occurs to me is that—and this is only a mechanical consideration—General Counsel doesn't have to make it his exhibit merely because he has offered it.

If it is offered, it will have to be offered by the Respondents.

Mr. Bakaly: Very well. As long as we have access to the document, that is the main thing.

Trial Examiner: And I gather what Mr. Mark was getting at was to have the extract from the Constitution marked as Exhibit No. 3; is that right?

Mr. Mark: As General Counsel's next in order.

Mr. Bakaly: There's no objection to that.

Mr. Mark: I'd like the reporter to mark this copy of Article V, "Jurisdiction," which is a true copy of Article V, [175] the article dealing with jurisdiction in the Constitution and By-Laws, the general laws, of Mailers Union No. 9, the International Typographical Union of Los Angeles, California and vicinity, adopted April 14, 1914 and approved by the I. T. W., and revised in 1956.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 3, for identification.)

Mr. Mark: Now, I move to have General Counsel's Exhibit No. 3 received in evidence.

Mr. Bakaly: We will stipulate that if Mr. Leathem were asked the questions setting forth the foundation for the document, his answers would be substantially the same as the description given by General Counsel in identifying the document; and with that stipulation we have no objection to the document's receipt in evidence.

Trial Examiner: In effect, you are not necessarily agreeing with its relevancy, but you are not questioning the authenticity of it?

Mr. Bakaly: That's right. I don't know. I'm stipulating that he could lay the foundation if he were so asked.

Trial Examiner: You are not raising, at this time, an objection for the document's admissibility?

Mr. Bakaly: No.

Trial Examiner: All right. The document identified as [176] General Counsel's Exhibit 3 may be received in evidence.

(The document heretofore marked General Counsel's Exhibit No. 3, for identification, was received in evidence.)

Trial Examiner: May I see a copy, please?

Mr. Mark: I would like to have Mr. Leathem resume the stand, please.

FRED MALACHY LEATHEM

a witness, recalled by and on behalf of the General Counsel, having been previously duly sworn, resumed the stand, was examined and testified further as follows:

Redirect Examination

Q. (By Mr. Mark): Mr. Leathem, you were present in the courtroom the other day when Mr. Clark, David Clark, was testifying as to his duties with the South Bay Daily Breeze; were you not? A. Yes.

Q. You heard him describe those duties?

A. Yes.

Q. And you described your position with Mailers Union No. 9 as that of an organizer? A. Yes.

Q. Would you give us a definition of just exactly what you do as an organizer?

A. As an organizer I seek out newspapers and mailing publications where we do not have a contract, a union contract, and by contacting the people who work in these establishments [177] I endeavor to bring them into our union and negotiate the contract with them for the publishers or owners.

Q. I show you General Counsel's Exhibit No. 3, which is Article V of your Constitution dealing with jurisdiction.

Are you familiar with that particular document?

A. Yes.

Q. In discharging his duties as a fly boy, a mailing room clerk at South Bay Breeze, would David Clark fall within the jurisdiction of your union?

A. Yes.

(Testimony of Fred Malachy Leathem.)

Mr. Bakaly: Just a moment. I move that the answer be stricken for the purpose of an objection.

Mr. Examiner, for the purposes of an orderly record, we should have here a description of the duties of David Clark in the mail room.

Counsel can paraphrase as he recalls what he believes to have gone into the record—

Trial Examiner: Insofar as this witness now is concerned?

Mr. Bakaly: That's right. The witness was here yesterday, and maybe he heard all the duties, maybe he didn't.

I don't think there's a proper foundation laid for the question. That's my objection.

Mr. Mark: Mr. Trial Examiner, I did already ask the witness if he recalled the testimony, and he stated he does. [178]

Trial Examiner: I will overrule the objection.

You can answer that again, Mr. Leathem.

The Witness: Yes.

Trial Examiner: The answer is "Yes."

Q. (By Mr. Mark): You also recall, Mr. Clark, David Clark, stating that he was offered a trainee position? A. Yes.

Q. As a trainee, would he fall within the jurisdiction of your union? A. No.

Q. Were you the party within the union organization who signed David Clark up to membership with Local 9? A. Yes.

Q. Do you recall when this was?

A. Yes. This was on the 15th of December.

(Testimony of Fred Malachy Leathem.)

Q. And at the time that you registered David Clark as a member with the union, did you receive an initiation fee from him? A. Yes.

Q. Was it a full initiation fee?

A. It was $10.00, which is a reduced initiation fee under amnesty.

Q. Would you explain what you mean by "amnesty"?

A. In certain cases for the purposes of organization, the International Typographical Union grants officers of local [179] unions the right to take nonmembers into membership of their organization under amnesty, the idea being that these people have not served a normal apprenticeship but are competent to perform certain phases of the mailing trade.

Q. At the time you signed up David Clark, did you promise him employment in any other establishment?

A. No.

Q. Was there any talk at all about working in another establishment? A. No.

Q. Was there talk at all about working in another establishment if David did not work at the South Bay Breeze?

A. I explained to David that if he were fired from the Breeze for no reason of his own that the Union would then endeavor to get him employment.

Q. I see. And did you tell him that at the time that you signed him up? A. Yes.

Q. This is on December 15th? A. Yes.

Mr. Mark: I have no further questions.

(Testimony of Fred Malachy Leathem.)

Cross-Examination

Q. (By Mr. Bakaly): Did you talk to David prior to December 15? A. Did I? [180]

Q. Yes, David Clark. A. No.

Q. Did you talk to his father?

A. I believe I had a conversation on the phone with his father.

Q. Were you here yesterday during the testimony of— A. Yes.

Q. —Mr. Clark? A. Yes.

Q. Do you work at the same place of business as Mr. Clark? A. No.

Q. You do not? A. No.

Q. Do you recall when this conversation was with Mr. Clark?

A. Well, I could explain it to you, how the conversation came about.

Q. I just want an answer to my question.

A. Exact date, no.

Q. You don't recall? A. No.

Q. Was it one week prior to December 15th?

A. Yes.

Q. Was it more than one week?

A. Within one week.

Q. Within one week? [181] A. Yes.

Q. So that your first conversation with Mr. Clark was on or about December 7th or 8th, 1959; would that be correct?

A. No. If you go back within one week, I would say it was between the 9th and the 15th, the 8th and

(Testimony of Fred Malachy Leathem.)

the 15th. I mean, I couldn't specify the day. We'll say the 9th. I couldn't say for sure.

Q. Did Mr. Clark tell you in his conversation that he wanted you to sign up his son to membership in the Mailers Union?

A. He told me he had spoken with Mr. Babior.

Q. Mr. Babior? A. Yes.

Q. Did he tell you he wanted to have you come over and talk with his son about joining the I.T.U. as a mailer room employee? A. Yes.

Q. Did he tell you the reason for that was the long hours his son was working at the South Bay Breeze? A. No.

Q. Did he tell you that the reason he was interested in your talking to his son was that his son was underpaid at the Daily Breeze? A. No.

Q. Did he tell you that the reason he wanted you to talk to his son was that his son wanted to get a job as a mailer [182] in Los Angeles? A. No.

Q. On the 15th you talked to David Clark and he joined the Mailers Union; is that correct?

A. Yes.

Q. But he didn't pay an initiation fee?

A. Yes, he did.

Q. Or he did pay an initiation fee; is that it?

A. Yes.

Q. So that the word "amnesty" in your Union does not mean the waiving of initiation fees?

A. It does mean—

Q. Just answer the question.

A. —the answer is yes and no.

(Testimony of Fred Malachy Leathem.)

Q. —then you can explain the answer.

A. All right. If a person is taken into our Union not under amnesty, the full initiation fee is approximately $115.00.

If they are taken in under amnesty, they can be taken in at a reduced rate of not less than $10.00.

Q. What was the fee paid by Clark?

A. $10.00.

Q. And then he is entitled to full membership in the Mailers Union? A. Yes.

Q. Is there an apprentice program in the Mailers Union—[183] A. Yes.

Q. —in the Journeyman's Classification in the Mailers Union? A. Yes.

Q. Did Clark come into that Union as a Journeyman? A. Yes.

Q. So that as far as you were concerned, on December 15th, 1959, David Clark was a Journeyman Mailer; is that right? A. Yes.

Q. During the period of time from December 15th, 1959, until December 22nd, 1959, have you contacted anyone at the Daily Breeze to request recognition as the collective bargaining representative of Mailer employees? A. No.

Q. Has anyone connected with the Mailers Union, Local 9, to your knowledge, contacted the Daily Breeze during the period from December 15th to December 22nd? A. No.

Q. Has anyone connected with the organization of the Mailers Union at any time, to your knowledge, contacted the Daily Breeze and requested recognition as

(Testimony of Fred Malachy Leathem.)

the collective bargaining representative of mailer employees? A. No.

Q. When I say "contacted," you understand me to mean in any manner by either phone or orally? [184]

A. Yes.

Q. Any requests, either written or oral?

A. Yes.

Mr. Bakaly: I think it might help the reporter if you waited until I finished talking before you answered, so there wouldn't be these interruptions.

Q. (By Mr. Bakaly): You had a conversation with David Clark on December 15th; is that correct?

A. Yes.

Q. At this conversation you asked him certain questions about the employees of the Daily Breeze; is that correct? A. Yes.

Q. Have you inquired of Mr. Clark, prior to that time, about the number of employees at the Daily Breeze or any questions concerning the employees of the Daily Breeze other than David Clark?

Mr. Mark: I am going to object to that. I think it's immaterial and irrelevant.

Trial Examiner: Overruled.

That question referred to Mr. Clark, Sr., if I understand you correctly.

Mr. Bakaly: That's right, prior to the 15th.

Trial Examiner: Good. Do you understand the question?

The Witness: I understand it, yes.

No, not to my recollection. [185]

Mr. Bakaly: All right.

(Testimony of Fred Malachy Leathem.)

Q. (By Mr. Bakaly): Your first conversation with anyone concerning the employees at the Daily Breeze occurred on December 15th in a conversation with David Clark?

A. Correct.

Q. Who else was present?

A. His father and his mother.

Q. Anyone else?

A. No.

Q. All right. Now, at that conversation did you ask the number of mailers who were employed at the Daily Breeze?

A. Yes.

Q. And what reply did David Clark give you?

A. That he was the only mailer at the Daily Breeze.

Q. The only mailer employed by the Daily Breeze.

A. Yes.

Q. Did he tell you his duties?

A. Yes. He told me that—yes.

Q. What did he say in that regard?

A. He said that he flew the escalator—I believe you would say "flew". He was a flyboy. I suppose the past tense is "flew".

Mr. Bakaly: You ought to know.

Q. (By Mr. Bakaly): What else did he say?

A. He said that he did the galley work. [186]

Q. Galley work? In what respect?

A. He handled part of the galleys.

Q. For what?

A. For the addressing of the papers.

(Testimony of Fred Malachy Leathem.)

Q. What else did he say he did?

A. Those were the two specific things he mentioned. And he said that he rope tied certain bundles, and various other duties in the mailroom.

Q. Various other duties inside the mailroom?

A. Yes.

Q. Did he tell you that he drove a truck on occasions for the company?

A. No. That wasn't mentioned.

Q. You're familiar with the National Labor Relations Act, are you not, Mr. Leathem, as organizer for the Mailers Union?

A. Yes, sir.

Q. You're familiar, are you not, with the fact that a bargaining unit must consist of more than one employee? A. No, I wasn't.

Q. Isn't that correct?

A. I was not aware of that fact.

Q. How long have you been an organizer with the Mailers Union, Mr. Leathem?

A. Approximately two years.

Q. And in that length of time you mean to tell me you [187] thought you could have a one man collective bargaining unit?

A. Yes. I have had them before.

Q. You have had a one man collective bargaining unit? A. Yes.

Q. Under a Board conducted election?

A. No. We have never had a Board conducted election in the I. T. U.

(Testimony of Fred Malachy Leathem.)

Q. That's something that occurred prior to November 13, 1959?

A. That's correct.

Q. Subsequent to November 13th, 1959, you may very well have Board elections; is that correct?

A. That is correct.

Q. The policy of the Union now is to avail itself of the services of the National Labor Relations Board; is that correct?

Mr. Mark: I am going to object to that question. I don't see the relevancy—

Mr. Bakaly: The question is certainly related to this matter of a one man unit, Mr. Examiner, and I think it is material here. If there was only a one man unit, there could be no union activity.

Trial Examiner: Isn't it a question as to whether we have a concerted activity. The proposition of the bargaining unit, per se, is not, as I see it, determinative. It is [188] whether David Clark engaged, or participated, in concerted activity.

Mr. Bakaly: How could he participate in concerted, activity when he was the only employee?

Trial Examiner: That is the question, and that's something I'd like to ask Counsel to enlighten me on. I would like to be enlightened on their views with respect to the theory that they hold in connection with that problem. There are things that suggest themselves to me as to how it is possible here. I don't think the representation question, as I see it, is determinative.

I think this will come under Sections (7) and (8)

(Testimony of Fred Malachy Leathem.)

of the Act, and whether this is an activity that fits in those rather than whether or not it is possible to have an election is, I think, important.

But that's only my tentative view. You can quite well persuade me otherwise.

Mr. Bakaly: I guess there is an objection pending.

Trial Examiner: There was an answer to the question.

If Counsel starts to speak, you might pause just a moment, Mr. Leathem.

As I recall, the last question was with respect to the policies of Mr. Leathem's organization in utilizing the services of the National Labor Relations Board, and I don't see any relevancy in that particular question. [189]

If there is an answer on the record, it may be stricken. The objection is sustained.

Q. (By Mr. Bakaly): Did you ask Mr. Clark, David Clark, during this conversation on the 15th, who worked in the mailroom?

A. Yes.

Q. And what did he reply?

A. He said he was the only mailer, and that there were two teen-aged boys who worked on Saturday for twelve or thirteen hours, or something like that.

Q. What else did he say?

A. That was—in that respect, that was all.

Q. That's all he told you about who worked in the mailroom? A. Yes.

Q. He did not tell you that there were seven full time mailers employed there? A. No.

(Testimony of Fred Malachy Leathem.)

Q. And he did not tell you that there seven part time mailers? A. No.

Q. And he told you he was a full time mailer; is that right? A. Yes.

Q. Did he tell you the names of the two teen-age boys? A. No.

Q. Did you ask him for names? [190]

A. No.

Q. —or addresses?

A. No.

Q. Did he tell you that Mr. Dennis Daines worked in the mailroom? A. No.

Q. He did not tell you that there were seven people employed by the Breeze who worked in the mailroom part time and were District Managers part time?

A. (No response)

Q. Did he tell you that? A. No.

Q. What else did you ask about the employees of the Daily Breeze during this conversation?

A. Well, I asked if there were any other employees there and he explained that there were two teen-aged kids who worked at similar jobs to his on Saturday, and, also, that if someone wanted papers out of the mailroom, they would just walk in and get them. They didn't work there, but they would walk in and get them, but he was the only employee directly doing the mailing work—mailing work in the Redondo press.

Q. Did he tell you there were some people there who tied papers? A. No.

Q. Do you know that to be a fact? [191]

A. No. [192]

(Testimony of Fred Malachy Leathem.)

Q. Isn't it true that the district managers at the Daily Breeze tie papers?

A. If you say so, and you know it is correct, I will accept what you say.

Q. But you don't know it of your own knowledge?

A. No, I don't.

Q. Now, you said something yesterday that interests me. I don't purport to remember overnight exactly what you said, but it seems to me that you said the Mailers Union does not desire to represent people who are full-time employees, but only to represent mailers who work part of the time.

Now, is that about what you said yesterday, substantially?

Mr. Mark: If there was any kind of doubt in the witness' mind, we might go back in the record.

Trial Examiner: We can, yes.

Mr. Bakaly: It's not that important.

Trial Examiner: We can, however, I think, as I remember it, that was in response to a question of mine—

Mr. Bakalay: That's right.

Trial Examiner: And also, so that your memory will not be diminished on the record so severely, actually, it was two days ago, Mr. Bakaly.

Mr. Bakaly: That's right. Thank you.

Trial Examiner: I will state my recollection of the answer and then I will ask Mr. Leathem if it is substantially [193] correct. Then, Mr. Bakaly, you take the subject up again.

Your testimony as I recall it, was that you did not

(Testimony of Fred Malachy Leathem.)

represent anyone as a mailer unless they did mailing work exclusively and didn't do any work other than what has been described here in a general way in this Exhibit as the duties of a mailer; is that correct, Mr. Leathem?

The Witness: Well, at the time the question was made to me, I think you were getting at whether there were any people that we represented that did both mailing room work and other work outside the mailing room.

Trial Examiner: I think that is the way the question was put, yes.

The Witness: And I said, "No. We had no examples of such people."

Trial Examiner: I think that is what the record states.

Mr. Bakaly: That is basically my recollection. I don't think we are apart on that.

Q. (By Mr. Bakaly): So I take it that if a person did mail room work 95% of the time, work within the scope of Article 5 here, in General Counsel's Exhibit No. 3, and did that work 95% of the time and work of another character 5% of the time, you would not organize that man?

A. We would organize that man.

Q. You would?

A. We would organize that man, yes. [194]

Q. All right. Suppose a man did mail room work within your jurisdiction, within the terms of Article 5, 75% of the time and other work 25% of the time, you would organize that man, too, wouldn't you?

(Testimony of Fred Malachy Leathem.)

A. Probably.

Q. Probably. If a man did mailers work 50% of the time and some other kind of work for a newspaper 50% of the time, you probably would organize that man if you could, wouldn't you?

A. Well, there would be a lot of circumstances in such a case.

Q. All right. Let's assume that he does not do the work that is presently covered by any other union in the printing trade?

A. In that case we would organize.

Q. You bet your life you would.

Let's go down to 35% of the time. He did mail work 35% of the time and he did some other work 65% of the time, but that work he did was not within the claimed jurisdiction of any other union at that time. You would organize him, wouldn't you?

A. Well, sir. This is a purely hypothetical question.

Q. Well, Mr. Leathem, you're an expert in this. You should be able to answer a hypothetical question of that sort.

A. That is true, sir. But I have never met up with such a case and I therefore could not tell you what my recollection [195] would be if I met with that circumstance.

Q. Let's take a hypothetical case of a newspaper where the bundles and so forth are tied by individuals, carried out and loaded onto the trucks by the same individuals, and the trucks are driven away and the bundles dropped by the same individual, dropped to the carriers.

(Testimony of Fred Malachy Leathem.)

This employee is an employee of the newspaper and not an agent or an independent contractor, and he's not; under the jurisdiction of the Teamsters or the Newspaper Guild. In that situation, isn't it true that you would attempt to organize that man?

Mr. Mark: I'm going to object to that question unless there is some sort of showing that this situation, in fact, exists in the South Bay Press.

Trial Examiner: I think the record shows that.

Mr. Bakaly: I will lay that foundation, although it is my recollection that it has been laid already.

Trial Examiner: Mr. Leathem said that David Clark informed him that people would come in and tie their own bundles and carry them out.

Mr. Bakaly: I know that somebody has testified to that and that it is in the record. I'm sure of that, Mr. Examiner.

Mr. Mark: I'm afraid I don't recall that particular portion of the testimony.

Trial Examiner: If it's not in there, it's not in there, [196] and the hypothetical situation would not be probative evidence, at any rate; but we'll take it under the assumption that this testimony will be there.

Do you have in mind the problem posed to you by Mr. Bakaly, Mr. Leathem?

The Witness: Sir, this hypothetical question that has been related to me, and the newspaper, quite frankly, in my experience as an organizer for the Mailers Union Local No. 9, I have come in contact with such a situation, and I would find it quite impossible to give

(Testimony of Fred Malachy Leathem.)

Counsel a direct yes or no answer as to what I would do under those circumstances.

In the first place, it seems to me that it would be a rather peculiar position where papers would come off a press, a boy would fly those papers, tie them in a bundle, run them onto the dock, jump into the truck, and run and deliver these papers?

Mr. Bakaly: I think you misunderstand my question.

The Witness: Wasn't that what you described?

Mr. Bakaly: No. I described this individual as one who would tie the papers, carry them from the mail room out to the dock and put them on a truck, in other words load the truck, maybe making several trips back from the mail room, maybe tying the papers at different times that he was loading them on the truck, and then driving the truck away and dropping the bundle for the carriers. [197]

He has nothing to do with flying the press.

The Witness: I misunderstood you, sir.

If I may reconstruct your hypothetical employee, do you mean for me to assume that the papers are taken off the press; they are in the mail room in, say bundles of 50 and this person comes in, takes those bundles of 50, and places them on the truck?

Mr. Bakaly: And ties them.

The Witness: Ties them and places them on the truck.

My answer is, "No." We would not endeavor to organize these people.

Q. (By Mr. Bakaly): But you would organize a

(Testimony of Fred Malachy Leathem.)

person who did mailers' work approximately 35% of the time and the other work that he did 65% of the time was not within the then jurisdiction of any other labor union. You would organize that person, wouldn't you?

A. I don't think I made that statement, sir.

Q. I'm asking you now.

A. I repeat that I would first have to meet this situation before I made the decision.

Trial Examiner: If you don't mind, Mr. Bakaly, I'd like to ask Mr. Leathem: Have you ever organized or solicited for membership employees whose work fell outside, or a portion of whose work fell outside, of this description of the jurisdiction which is in Article 5 of General Counsel's Exhibit 3?

The Witness: No.

Trial Examiner: You never have?

The Witness: No. They have always been exclusively what we call "inside mail room employees."

Trial Examiner: They have always been inside mail room employees?

The Witness: That is correct.

A. (By Mr. Bakaly): Well, if you haven't met this situation I just described of an employee working 35% of the time doing mailing work and 65% of the time doing work not then claimed by another union, then you haven't ever had the situation of attempting to organize the hypothetical individual in my hypothetical question, have you? A. That is correct.

Q. You have never had that situation?

A. That is correct.

(Testimony of Fred Malachy Leathem.)

Q. So you don't know whether you would organize that individual or not, do you?

A. I believe that is what I said, sir.

Q. I believe your answer is that you would not.

A. I said—

Q. Go ahead. You may explain what you said.

A. I said that if an individual is your hypothetical case came into the mail room, got a bundle of newspapers, took them to a truck, dropped them on the route, I would not endeavor [199] to organize this person.

Now, if you would like to know what I would endeavor to do under such a circumstance, I would tell you—do you desire to know what I would do?

Q. Yes. I'd like to know what you would do.

A. Well, as you well understand, the part of the work which he did in the mail room would be under our jurisdiction, and when we would sign a contract with the employer or the publisher we would endeavor to include the jurisdiction of tying these bundles in our contract.

Trial Examiner: And loading them, too, I assume?

The Witness: And loading.

Q. (By Mr. Bakaly): And if this hypothetical person drove a truck, would you be interested in having him as a member of your union?

A. It could go either way. If 95% of his work was on the truck, he would probably continue on the truck, and therefore, I would have no further interest in the person.

(Testimony of Fred Malachy Leathem.)

Q. Well, suppose 65% of his time was on the truck and 35% of his time was spent in the mail room?

A. It is still probable he would go on the truck. We are only interested in the work that he is doing which falls within our jurisdiction. His work in the mail room would entitle him to membership in our union and we would certainly take him in, but he could not continue to drive the trucks. [200]

Q. He could not continue to drive trucks?

A. No. We are not interested in taking jurisdiction of the Guild or Pressmen or anything else. We are only interested in our own jurisdiction in the mail room.

Q. I'm not sure that I understand what you are saying exactly. Let's take my hypothetical man again. You say if he worked 35% of the time in the mail room, you would try to enter into a contract covering that 35% of his time; is that what you mean?

A. That is right.

Q. Well, would that contract specify that he would have to be, within 30 days after the signing of the contract, a member of the Mailers Union?

A. No. We do not operate a union shop or a closed shop in the I.T.U.

There's no such specification in any of our contracts.

Q. The I.T.U. does not operate a union shop?

A. That is correct.

Trial Examiner: I think that this is probably getting to a point where you wouldn't be accomplishing anything productive, Mr. Bakaly. I think the thing that wasn't answered specifically, which was suggested,

(Testimony of Fred Malachy Leathem.)

at least by Mr. Leathem, was that the work in the mail room, if he obtained a contract with the employer, would be done by people of your organization, if I understand it correctly; is that right? [201]

The Witness: That is correct.

Trial Examiner: And that would preclude the people who did that work from doing work that was not within the jurisdiction of your union; is that correct?

The Witness: That is right.

Mr. Bakaly: I'm not sure that is what he said. That's where I am confused. I don't think that's what the witness has testified. He's testified that—and I'm not contradicting you—but he has also testified to my hypothetical situation where a man is doing work only 35% of the time, work in the mail room, and he has said that he would not require those people to come into the union. He might require them to come into the union when they did that work under a different pay scale from what they did the other work.

Trial Examiner: I think Mr. Leathem will ultimately answer this, but I'm going to give you my understanding of what he said.

Mr. Leathem's organization would seek to have that work assigned to someone in their organization, and it doesn't necessarily have reference to an individual. If the individual didn't perform the work, that would be secondary; but it would be someone who would be a member of his organization that would do the work and if the man was driving a truck 65% of the time, as I understood, why, that man would not do any more inside work. He would no longer be interested in that man. [202]

(Testimony of Fred Malachy Leathem.)

Mr. Bakaly: But that might be one of the men who joined the Mailers Union and does full time mailer work after the contract has been consummated.

I think this is important to determine whether there's been any discrimination here.

Trial Examiner: I agree, and I appreciate that what you and I say is not evidence; but maybe it will point up, possibly, what should be developed. What Mr. Leathem's testimony means will be interpreted differently, and I think it should be cleared up.

Why don't you go ahead and—

Off the record.

(Discussion off the record.)

Trial Examiner: On the record.

Mr. Bakaly: The question that I propose may very well—and I don't know—go to the witness' credibility.

Trial Examiner: This has reference to a union or a closed shop, Mr. Bakaly?

Mr. Bakaly: Yes. This witness has testified that the I. T. U. does not operate a closed shop, or a union shop; and I assume he means that to be anywhere in the world, and I personally am aware of many cases in the reported opinions of the Board and of the Courts dealing with the closed shop provisions of the I. T. U. contract.

Trial Examiner: Well, again, even though it has been [203] written up in my law books, it's still a legal conclusion as far as this witness goes, and I don't think it is too important to the issues and even on the credibility aspect.

I'm sure that there are many people in his organiza-

(Testimony of Fred Malachy Leathem.)

tion who think, perhaps, that some decisions have been wrong, with respect to the determinations.

Mr. Bakaly: I'm sure that the I. T. U., from the man at the top down to the man at the bottom, thinks these decisions are wrong; but the question of fact still is, in my opinion, that they operate a closed shop. But that's neither here nor there.

Mr. Mark: Well, Mr. Trial Examiner, I object—

Trial Examiner: I'm going to sustain an objection to your intended question, if one isn't already made. And if one is being made, I assume that it is being made to that line of questioning.

Mr. Bakaly: Very well.

Q. (By Mr. Bakaly): Now, you also stated yesterday—excuse me, on Tuesday, Mr. Leathem—that your jurisdiction extends from the time the printed material comes off the press until it is delivered on the dealer's trucks?

A. That is correct. To the dealer's trucks, I believe I said.

Q. To the dealer's truck? A. That is right. [204]

Q. Your jurisdiction does not extend on to the dealer's trucks?

A. No. He will tail-gate delivery.

Q. Tail-gate on the truck?

A. That's right. My Irish accent gives people problems.

Q. Would there be any difference if the truck was operated by an employee and not a dealer?

A. No.

(Testimony of Fred Malachy Leathem.)

Q. You stated in answer to a question by General Counsel here this morning, that as a trainee, David Clark would not be eligible for membership in your union; is that correct?

A. I said that we would not represent him.

Q. You would not represent him? A. No.

Q. And that's because he is a trainee?

A. That is because the work he would be doing in reference to the particular instance of what we are talking about, that he would not be *being* work within the jurisdiction of the Mailers Union.

Q. He could still be a member of the Mailers Union, however?

A. Oh, yes. But we wouldn't seek to represent him as a bargaining agent.

Q. And what work would that be?

A. To what do you have reference?

Q. District manager, trainee for a district manager. [205]

A. We would not wish to represent him as a bargaining agent.

Q. You don't wish to represent district managers?

A. Correct.

Q. Even when they do mailers' work part of the time? A. Correct.

Q. But if they did mailers' work 50 per cent of the time, I think you said you would represent them then?

A. I think—when you got down to that point, I think I said I would have to meet the situation as it came about.

Q. But you probably would represent him—

(Testimony of Fred Malachy Leathem.)

Mr. Mark: I'm going to—

Q. (By Mr. Bakaly): —if 50 per cent of the work done by the district manager at the South Bay Daily Breeze—

Trial Examiner: I think we have been over this ground before.

Mr. Bakaly: Well, I'm not going any further with it.

Q. (By Mr. Bakaly): To go back to our hypothetical question, our hypothetical individual, the man who does mailer's work 35 per cent of the time, and you organized the mail room of a newspaper that has this hypothetical individual, is it true, is it not, that you would attempt to negotiate a contract that provided that all of the mailers' work would be done only by mailers? A. Correct.

Q. And you would attempt to obtain a contract which provided [206] that this hypothetical man could no longer do 35 per cent of the mailers' work, is that right? A. I didn't say that, sir.

Q. —or that 35 per cent of the work must be done by mailers? A. Correct.

Trial Examiner: —who did just mailing work; is that correct, Mr. Leathem?

The Witness: That is correct.

Trial Examiner: Doesn't that really cover the ground, Mr. Bakaly? It would be the position, in this hypothetical situation, that these people who did mailing work would no longer do other work. That is what it really boils down to, isn't it?

Mr. Bakaly: That's right.

(Testimony of Fred Malachy Leathem.)

Trial Examiner: I think the inference is just inexorable, and that this is what would be material.

Mr. Bakaly: I just have one more question or so along that line.

Q. (By Mr. Bakaly): As a practical matter, some of the people that have been doing both mailers' work and the non-mailers' work would then do only mailers' work? A. That could be, yes.

Q. —and be within your jurisdiction?

A. That could be. [207]

Mr. Bakaly: I'd like to ask the reporter as Respondent's next in order, an agreement between Local No. 9 of the I. T. U. and the Hillbro Newspaper Printing Company.

(Thereupon the document heretofore referred to was marked as Respondent's Exhibit No. 4 for identification.)

The Witness: Sir, if I may say so, at this time, this agreement has expired.

Trial Examiner: Excuse me, this is something your Counsel will probably take up.

We will take a short recess.

(Whereupon a short recess was taken.) [208]

Trial Examiner: On the record.

Mr. Bakaly?

Q. (By Mr. Bakaly): I show you what has been marked as respondent's No. 4, and ask you if this is an agreement that was in effect between your union and the Hillbro Newspaper Printing Company during the period, September 1, 1957, to August 31, 1959?

A. Yes.

(Testimony of Fred Malachy Leathem.)

Mr. Bakaly: I would like to offer this exhibit into evidence at this time, for the purposes of showing that the union does have a certain jurisdiction of people who might be considered similar to the district managers at the Daily Breeze, and for the purpose of impeaching this witness, his testimony, in the light of Section 17 of the contract, which I would like to offer but which I do not have with me and I have been unable to make extracts of it. I can have that done and submit that, however.

Trial Examiner: You are only interested in Section 17?

Mr. Bakaly: That is right.

Trial Examiner: I would suggest then that extracts be made of this available to the reporter at a later date.

Mr. Mark: Just a minute. If it is being offered for impeachment—

Trial Examiner: I think it is a question of foundation, to find out what, if anything, is Mr. Leathem's connection with the contract. [209]

Would you agree with that, Mr. Bakaly?

Mr. Bakaly: Well, I don't really think it makes any difference because this is an admission of the union as to what is in their jurisdiction, and merely by the fact that he has testified that he has entered into the contract which would certainly make him a party of it.

Trial Examiner: It might have some bearing. However, it might assume more significance if something else were developed, too.

Mr. Bakaly: I will ask the questions that the Examiner's remarks suggest.

(Testimony of Fred Malachy Leathem.)

Mr. Mark: May I see that contract, please?

Mr. Bakaly: Surely.

Q. (By Mr. Bakaly): Did you have anything to do with the negotiations of that contract?

A. No.

Q. Are you familiar with it? A. Yes.

Q. Does it correctly set forth the jurisdiction of your union, so far as you know?

A. (No response.)

Mr. Bakaly: No further questions—on the foundation.

Trial Examiner: Oh, I see. But are you offering the exhibit?

Mr. Bakaly: I am offering it in evidence. [210]

Trial Examiner: Do you have any objection, Mr. Mark?

Mr. Mark: I have no objection, except that it shows what the jurisdiction of the Mailers Union included so far as the agreement between the Mailers Union No. 9 and Hillbro Newspaper Printing Company is concerned, and the fact that it is not any longer in effect which, in effect, make it immaterial.

Trial Examiner: I think this is something that goes to the weight of the argument. It will be admitted.

(The document heretofore marked Respondent's Exhibit 4 for identification was received in evidence.)

Mr. Bakaly: I will have extracts made and submitted to the reporter as soon as possible.

Trial Examiner: All right.

Mr. Bakaly: I think that's all the questions I have.

(Testimony of Fred Malachy Leathem.)

Redirect Examination

Q. (By Mr. Mark): Mr. Leathem, are you familiar with the fact that there are other boys employed besides David at the South Bay Daily Breeze that do flyboy work?

Mr. Bakaly: Object to the question unless it is limited as to time. If it was after December the 21st, 1959, it would be irrelevant and immaterial to this proceeding.

Trial Examiner: I think that is correct, Mr. Mark.

Q. (By Mr. Mark): As of December 15th, 1959, do you know whether there were other flyboys in the operation of the Daily Breeze? [211]

A. Yes.

Q. Would these flyboys be eligible for inclusion in the unit in the Mailers Union? A. Yes.

Trial Examiner: Are we speaking from the union's jurisdictional standpoint, or from a Labor Board collective bargaining appropriate unit standpoint? When you're talking about "eligible," what do you mean?

Mr. Mark: I am talking about eligibility so far as Mr. Leathem's organizational efforts are concerned.

Trial Examiner: And you answered "Yes" to that?

The Witness: Yes.

Trial Examiner: All right.

Mr. Mark: I have no further questions.

Trial Examiner: Mr. Bakaly?

(Testimony of Fred Malachy Leathem.)

Recross-Examination

Q. (By Mr. Bakaly): And these boys that you have just referred to are the two teenage boys that Clark informed you of?

A. That is correct.

Q. Do you know how many hours a week they worked? A. No, sir.

Q. Do you know whether there was any turnover among these two boys, or the degree of turnover?

A. No, no. [212]

Trial Examiner: I think on your previous interrogation in answer to your question, Mr. Bakaly, Mr. Leathem said he knew they worked on week ends, and he made no effort to contact them nor to get their names and addresses.

Mr. Bakaly: Well, he doesn't know whether boy "A" was on with boy "B", or with boy "E" or "G". He doesn't know whether the same individuals came each Saturday, or whether there was a turnover.

He doesn't know whether one boy was working a full shift on Saturday, or whether there were several boys filling part-time slots.

Q. (By Mr. Bakaly): Is that statement correct, Mr. Leathem?

A. That is correct.

Trial Examiner: Well, I think that you will find that as far as the record goes that will all be in there.

Mr. Bakaly: That's what I was trying to bring out. That's all I have.

Trial Examiner: Thank you, Mr. Leathem.

(Witness excused.)

Mr. Mark: Just one moment, Mr. Trial Examiner. We would like to recall David Clark to the stand.

Trial Examiner: Would you come up here, please, Mr. Clark?

DAVID CLARK

a witness recalled by and on behalf of the General Counsel, having been previously duly sworn, was examined and testified [213] further as follows:

Trial Examiner: You have been sworn previously, you understand and are still under oath, Mr. Clark?

The Witness: Yes.

Trial Examiner: And I think we are going to remember today to speak quite slowly.

Further Redirect Examination

Q. (By Mr. Mark): David, are there any other employees who worked in the mail room besides yourself during any other period for South Bay Daily Breeze?

A. Well, there was as far as my knowledge goes. There were the two teenage boys that were brought in, and then on Wednesday nights there was—I know there was Mr. Starbuck and this other gentleman. I don't know his name.

They were union mailers.

Q. Do you work in the mail room? A. Yes.

Q. What type of work do they do?

A. They mail out the advertisers, the 8,000 peninsula advertisers.

Q. That would be on Wednesday nights?

A. On Wednesday nights, yes.

(Testimony of David Clark.)

Q. And to the best of your knowledge are they union members of the Mailers Union, Local 9?

A. Yes. [214]

Mr. Mark: I have no other questions.

Mr. Bakaly: I don't have any cross-examination, but I would like to call this witness under 43(b).

Trial Examiner: While you're here, Mr. Clark, and you may have answered this already, but I'd like to ask you again if you will answer this question: When you were talking to Mr. Collins on this Saturday and Monday about this trainee job, did you advise Mr. Collins that you had agreed with a union representative that you would not do any other work accept working in the mailroom?

The Witness: Did I tell him that?

Trial Examiner: Yes. Mr. Collins.

The Witness: No.

Trial Examiner: You don't recall telling him that?

The Witness: No.

Trial Examiner: All right, anything else?

Mr. Mark: No.

Trial Examiner: General Counsel rests then?

Mr. Mark: General Counsel rests.

Trial Examiner: Mr. Bakaly?

Mr. Bakaly: Could I have just a few minutes to get down that last?

Trial Examiner: Certainly.

Mr. Bakaly: Respondent will call Mr. Jack Clark.

a witness recalled by and on behalf of the Respondent, having been previously duly sworn, was examined and testified further as follows:

Trial Examiner: May the record reflect that Bernard Jack Clark is the same Mr. Clark that has previously testified, and you understand that you are still under oath, having been sworn previously?

The Witness: Yes, sir.

Mr. Bakaly: Mr. Examiner, I believe there is sufficient foundation to indicate that this witness is hostile to the respondent, and I would like to request that I question him under 43 (b) so that I may ask him leading questions.

Mr. Mark: I am going to make an objection here, Mr. Trial Examiner, if the leading questions that are going to be brought up go to the matter of defense and not to any issues which were brought up in Mr. Clark's direct testimony already.

Mr. Bakaly: We have denied all your allegations, so that anything you have proved is a part of our defense, I am afraid.

Trial Examiner: I am going to avoid passing on this in advance, Mr. Bakaly.

My approach will be that if I think a question will produce what this witness has to testify to, I will not sustain an objection to it merely because it is leading; but I'm not going to adopt, necessarily, a characterization at this point that this witness is hostile to the respondents. I think that [216] if the question is intelligible to the witness and it is clear that he is not adapting the question and understanding it, why, as a

(Testimony of Bernard Clark.)

matter of expedition I would encourage him to get right at the heart of it.

Mr. Bakaly: I meant to characterize him as an unwilling or hostile witness only within the meaning of 43(b). I am not trying to say that he is personally hostile to us.

It is my understanding of 43 (b) that any witness who has testified affirmatively for the other side may be interrogated as an unwilling or hostile witness through leading questions.

This is different from calling a witness under 43 (b).

Trial Examiner: That may be true, but it is not my understanding, Mr. Bakaly, because I have encountered situations where the witness was fully objective no matter who called him, and the fact that he, at the time, was on one side or the other doesn't lead necessarily to the conclusion that his answers will be evasive or unsatisfactory.

Why don't we see how these questions go, and we can deal with them as the problem arises.

Direct Examination

Q. (By Mr. Bakaly): Mr. Clark, I want to ask you about your testimony of the other day. You stated that after the 21st of December you had talked with an insurance man about rates?

A. Yes, afterwards.

Q. Was that Mr. Peterson or was that somebody else? [217]

A. It was someone in his office there.

(Testimony of Bernard Clark.)

Q. Your conversation with Mr. Peterson occurred in June of 1959; is that right?

A. Or his representaive. It was someone in his office there.

Q. Well, when you purchased the Farmers Insurance, that was in June of 1959?

A. Yes.

Q. And you purchased that from Mr. Peterson? I believe you testified to that yesterday.

A. Mr. Peterson, or his representative.

Q. Now, during the fall of 1959, and by fall I mean from September to November or December, you had several conversations with your son, David, about his desire to leave school; did you not?

Mr. Mark: I am going to object to that. I don't see where it is material or relevant.

Mr. Bakaly: Well, it is, I believe, Mr. Examiner, as I will show shortly.

Trial Examiner: I think it has been asked and answered already. It's been related, how David wanted to have more leisure time and he was trying to enlist Mr. Collins' aid to persuade his father that it would be all right for him to leave school.

Mr. Bakaly: I wasn't sure it had come out that way.

Q. (By Mr. Bakaly): Is that the case, Mr. Clark? [218]

A. I mentioned it to Mr. Collins, that David wanted to quit school.

Q. And you talked with David about it?

A. And I told him, yes.

(Testimony of Bernard Clark.)

Q. David wanted a job where he could have shorter hours; isn't that true?

A. Yes, on Saturday.

Trial Examiner: Yes, on the week end. And I think the record is quite clear on that.

Q. (By Mr. Bakaly): There were jobs in Los Angeles where David could work shorter hours and make more money, to your knowledge, in November or December of 1959; were there not?

Mr. Mark: I will object to that. Again, I will object to it as being vague and indefinite. We don't know whether he is talking about mailer jobs or any kind of jobs.

There are loads of jobs which are advertised in the paper.

Mr. Bakaly: Well, I think the witness understood that I was talking about jobs that David could do.

The Witness: No, no, I don't.

Trial Examiner: Excuse me. I guess I am guilty too of breaking in; but for the reporter's sake, if we can speak one at a time I think it will be helpful.

Now, Mr. Mark objects to the question on the grounds that it is too remote. Do you have anything to say about this, Mr. Bakaly? [219]

Mr. Bakaly: I am talking about it in the context of what was developed previously and what the record reflects, that David actually has a job now working in Los Angeles where he makes as much or more money than he was making before, and in that light I think it is significant whether Mr. Clark, Sr. at that time knew these jobs were available in Los Angeles.

(Testimony of Bernard Clark.)

Trial Examiner: Absolutely. However—

The Witness: Yes. And the answer to that is "no."

Trial Examiner: You didn't know they were available?

The Witness: No. I didn't.

Trial Examiner: Did you know that there was a potential availability of doing the kind of work that David is doing now in Los Angeles, back in October and November and December of 1959?

The Witness: Well, only that it would be related to the printing trade and when they have said about this working in Los Angeles—I mean, through my position I could have acquired work for him—but not as a mailer—but in work with a printing plant, and that's the only time I have ever said "yes" to a question if he could work in Los Angeles.

But I could never procure him any work as a mailer.

Mr. Bakaly: Nobody's asking you if you could procure him work as—excuse me, Mr. Examiner. You go ahead.

Trial Examiner: If I put it this way, Mr. Clark: Back in the fall and late fall, and in the period involved here in [220] 1959, were you aware of the fact that there was the work of the kind that David is now doing in Los Angeles that was being carried on in whatever publishing or printing house that he is working for? Did you know that there was such kind of work?

It is whether you knew it or not, not whether you could get him a job.

(Testimony of Bernard Clark.)

The Witness: It's a related field to what I do. I do know that that work was being carried on.

Trial Examiner: And at that time, if I understand you correctly, you did not know whether or not there were any specific openings for these jobs, but you knew there was a potential for David or anyone else to get this type of work in the printing or publishing field; would that be a fair statement?

The Witness: Well, I would presume so. He could —although I never really give it any thought, for him to work as a mailer in Los Angeles.

Trial Examiner: All right.

Q. (By Mr. Bakaly): You had opportunity to observe the operations of a mail room at the place you worked; did you not? A. Yes.

Q. And you did observe that there were many part-time employees in this organization; did you not?

Mr. Mark: I am going to object to that. I think that's [221] completely immaterial and irrelevant to this proceeding. The fact that Mr. Clark observed mail room employees at some establishment running around and doing their jobs has nothing to do with this proceeding, and has nothing to do with any of the issues in this case.

Trial Examiner: What it would bear on, as I see it, is the alternative that might have been contemplated by Mr. Clark, Sr. and junior—and I will use the term loosely—in connection with this issue as to whether he was discharged or left voluntarily.

I think it arguably might have some connection with that, Mr. Mark.

(Testimony of Bernard Clark.)

The people—what we are dealing with here now are events that no one really controverts very much, at least as to what happened; but the interpretation and the inferences to be drawn from the things that surround these events is what presents the problem. And I think that this may have some bearing on that aspect of it.

So—did you observe people doing part-time mailing work in the course of your employment in the printing end of the I. T. U.?

The Witness: Yes.

Trial Examiner: Did you observe that, Mr. Clark?

The Witness: Are you making reference to where I work?

Trial Examiner: Well, you could start there. [222]

If you knew it was common to have part-time mailers, if you observed it there. Did you have any exposure in the printing trade where you wouldn't have a reasonable basis for concluding that the same conditions of employment prevailed in other printing or publishing establishments, or if you didn't know, why say so.

The Witness: I really couldn't say that I knew for sure that there was part-time employment for them.

Mr. Bakaly: Well, you testified the other day that Mr. Babior was a good personal friend of yours.

The Witness: Not a good personal friend. He works where I do.

Q. (By Mr. Bakaly): And a man you talked to on several occasions, you testified, I believe; isn't that right? A. That is true.

Q. And he is an official of the Mailers Union?

(Testimony of Bernard Clark.)

A. I understand that he's vice-president.

Q. Mr. Babior is vice-president? A. Yes.

Q. Did you talk to him about the working conditions of the mailers in Los Angeles?

A. Working conditions?

Q. Yes.

A. No. I don't believe so.

Q. When you complained about the working conditions of your [223] son in Redondo Beach, didn't you naturally ask him about working conditions of mailers in Los Angeles, to see if they were the same or worse?

A. I knew the approximate hours that the men worked where I worked.

Q. You knew the hours they worked. You also knew some of them worked part-time, didn't you?

Trial Examiner: He has already answered that.

Mr. Bakaly: Well, he's been hedging on this, and I don't think there's any need for it. I think the answer is obvious.

Trial Examiner: Maybe that's true, Mr. Bakaly, and I'm encouraging Mr. Clark to tell us as freely as he can what you do know, or have a reasonable basis to believe, with respect to employing part-time mailers, and this goes back again to the fall of 1959.

Mr. Mark: I am going to move that the reporter strike from the record the remark about "hedging."

Mr. Bakaly: I think it is obvious—

Mr. Mark: I object to respondent's counsel characterizing the witness' testimony in this manner. I don't believe that this witness has hedged at all.

(Testimony of Bernard Clark.)

Mr. Bakaly: The record speaks for itself.

I'm entitled to characterize the witness' testimony.

Mr. Mark: I think that if Mr. Bakaly wishes to characterize the witness' testimony, he can do that in final argument, [224] not now.

Trial Examiner: I don't think it will either hurt or help the record at all, either one way or the other, Mr. Mark.

Mr. Mark: I am just interested in not seeing the witness badgered, Mr. Trial Examiner.

The Witness: I appreciate that.

Mr. Bakaly: I do, too.

I am not badgering the witness. I am just trying to get some straight answers out of him. I think the Examiner will agree that I have had great difficulty in getting straight answers to questions which the witness knows the answers to.

Trial Examiner: The witness may be trying to be careful and objective, and may have reasons that are quite valid for being apparently overcautious in his answers.

We want, Mr. Clark, for you—I am going to encourage you to tell us, and maybe we can wind this subject up, what your understanding was when you approached this union representative as to working conditions for part-time mailers in the Los Angeles area with respect to hours and rates of pay, as contrasted to the hours and rates that your son was getting

Now, what was your understanding about that?

The Witness: Well, that they did work a much

(Testimony of Bernard Clark.)

shorter day, and that they received a greater amount of money for it.

Trial Examiner: All right. And was it your understanding, also, that, in addition to your own place of employment, there [225] were part-time mailers employed in this general area?

The Witness: I really couldn't say because I have been in this place for so long, and I haven't been any place else.

I really couldn't say that at all.

Trial Examiner: As far as you can reconstruct your viewpoint back in the fall of 1959, you can't tell us now whether you then had an impression as to whether part-time mailers were being employed any place else other than where you worked and where David worked; is that what I understand your answer to be?

The Witness: Well, yes. I presume that—that they had that.

Trial Examiner: Well, that's what I was trying to get at.

The Witness: But I—I—

Trial Examiner: You didn't know that as a matter of positive personal knowledge, but assumed that was a condition that was generally prevalent in the publishing and printing industry; would that be a fair statement?

The Witness: Yes. May I make one more statement?

Trial Examiner: Surely.

The Witness: If you would ask whether I knew a

(Testimony of Bernard Clark.)

specific person, if he worked some place part-time, I couldn't say. I couldn't—I had no one in mind.

Trial Examiner: I understand that. All right.[226]

Q. (By Mr. Bakaly): Well, you knew in November and December of 1959, didn't you, Mr. Clark, that in order to get a job as a mailer in Los Angeles part-time, or full-time, a person had to be a member of the I. T. U. Local No. 9? A. Yes.

Q. Isn't that one of the reasons why you assisted your son in becoming a member of the union, so that he could get one of these jobs in Los Angeles part-time?

A. No, sir.

Trial Examiner: Did that play any part at all in your approaching a union representative with reference to getting your son in the union? To make it clearer, did you consider then that if he didn't go to work in some other establishment than the Daily Breeze that he would be in a better position to get work elsewhere at some future date?

The Witness: No, sir. That had nothing to do with it, no, sir.

Trial Examiner: Well, aside from what you thought then, it's true that in the printing industry it is a practical advantage in getting a job to belong to the I. T. U.; isn't that a correct statement?

The Witness: Well, it—it certainly helps and makes it much easier if you belong.

Trial Examiner: And you have been a member?

The Witness: For about 21 years. [227]

Q. (By Mr. Bakaly): Now, on December 19th, you had a conversation with Mr. Collins; is that correct? A. Yes.

(Testimony of Bernard Clark.)

Q. During that conversation did you tell Mr. Collins that your son had joined the union at home?

A. Yes.

Q. Did you have any conversation about the word "amnesty"? A. Yes.

Q. What was said?

A. Well, Mr. Collins wanted to know how he could just join a union like that. I said he was taken in under the laws of amnesty.

The I. T. U., as I heard Mr. Leathem repeat the oath to him, and he said that under the power invested in him under the laws of amnesty—that was why he was taking him in.

Q. Did you also tell Mr. Collins that David was under amnesty and something was being lined up for him in Los Angeles? A. No, sir.

Q. Or something was being lined up for him, period, or words to that effect? A. No, sir.

Q. Now, were you present during this conversation between Mr. Leathem and your son on the 15th?

A. On the 15th? That's—yes.

Q. Did you discuss rates of pay for mailers in Los Angeles [228] at that time? A. No, sir.

Q. Did you discuss working conditions of mailers in Los Angeles at that time? A. No, sir.

Q. Now, on the 19th in your conversation with Mr. Collins, did you have a conversation about what mailers could make in Los Angeles? A. No, sir.

Q. You didn't tell him at that time that the rates of pay at the Daily Breeze were much lower than the rates of pay in Los Angeles?

(Testimony of Bernard Clark.)

A. I may have told him that the pay was low there, that the reason—that this might be the reason why he would have trouble in people leaving, things like that.

Q. You mean in district managers leaving?

A. Yes.

Q. Was it your understanding in Los Angeles that district managers worked as mailers; would that be correct?

A. No, I didn't know that.

Q. Did you say anything about the union's scale for mailers in this conversation with Mr. Collins?

A. No.

Q. Did Mr. Hill make any statement about the union wages? A. I can't recall that, sir. [229]

Q. Is it your testimony then on the 19th of December you did not know the wage rate of the mailers in Los Angeles; is that right?

A. Not exactly. I knew approximately.

Q. I am not asking you exactly, Mr. Clark. What did you know about the wage rates of mailers in Los Angeles?

A. That it was over $3.00 an hour.

Q. Thank you.

During the conversation on the 15th, do you recall your son David telling Mr. Leathem there were seven full-time mailers employed at the Breeze?

A. Seven full-time mailers? No, sir.

Q. Do you recall him telling you that there were seven part-time mailers at the daily press?

A. No, sir.

(Testimony of Bernard Clark.)

Q. Do you recall him telling you that Dennis Daines was a mailer? A. No.

Q. Did you ever have a discussion with your son or Mr. Leathem concerning whether or not the district managers would come within the mailers union?

A. No, I don't remember that.

Q. You never had any such conversation, or you don't remember?

A. No. We never had such conversation.

Q. You never talked with your son at that time about whether [230] or not the district managers were mailers or not? A. No.

Mr. Bakaly: No further questions.

Cross-Examination

Q. (By Mr. Mark): Mr. Clark, you have testified that you had had some conversations with your son about remaining in school; is that correct?

A. That is true.

Q. And you testified earlier, I believe, that he attended El Camino College? A. Yes.

Q. How far is El Camino College from where you live, approximately? A. Three miles.

Q. And approximately how far is it from El Camino College to the South Bay Daily Breeze?

A. About six miles.

Q. How far is it from El Camino College to Los Angeles?

A. Where abouts in Los Angeles?

Q. Let's say from El Camino College to the Pacific Press? A. Probably 18 miles.

Q. Isn't it a fact, Mr. Clark that the purpose of

(Testimony of Bernard Clark.)

your visit to Mr. Collins on Saturday, December 19th, was for the purpose of keeping David there in the job as a flyboy?

Mr. Bakaly: Objected to as leading. [231]

Mr. Mark: He's your witness.

Mr. Bakaly: Well, I called him as a hostile witness. I don't believe he can lead his own witness under this procedure, Mr. Examiner.

Trial Examiner: I think the question has really been asked and answered. Perhaps not in that precise form. Anyway I am going to overrule Mr. Bakaly's objection.

Mr. Mark: Would the reporter read back the question?

(Question read.)

The Witness: Yes, that's true.

Q. (By Mr. Mark): And that, as a matter of fact, you had a conversation with Mr. Collins about keeping David working at the South Bay Daily Breeze?

A. Yes, that's true.

Q. And you had no reason to seek employment for David in the Los Angeles area, because you were satisfied with his position at the South Bay Daily Breeze—

Mr. Bakaly: Mr. Examiner, may it be understood that I have a continuing objection to this line of questioning?

Trial Examiner: Certainly.

Q. (By Mr. Mark): —with the possible exception of those eight hours on Saturday?

A. Of the how many hours on Saturday?

(Testimony of Bernard Clark.)

Q. Well, the 12 hours, or whatever hours he worked over his normal eight-hour shift? [232]

A. Approximately eight hours on top of the eight hours. I would agree to that.

Trial Examiner: You liked the location, but not the hours, Mr. Clark? I mean, the geographical location?

The Witness: That is true.

Q. (By Mr. Mark): And isn't it a fact that you also asked Mr. Collins to retain David at the flyboy job?

A. Yes, I did.

Mr. Mark: I have no further questions.

Redirect Examination

Q. (By Mr. Bakaly): Now, Mr. Clark, you weren't satisfied with David's job at the Daily Breeze at all, were you?

A. The location. But the hours, no.

Q. And the pay, no. You weren't satisfied with the pay, were you? A. Not particularly.

Q. A dollar and a half as compared with three dollars an hour? Of course, you weren't satisfied with the pay; is that correct?

A. I never talked to Mr. Collins—

Q. That's not the question I asked, and I want an answer to the question.

Trial Examiner: It isn't responsive.

Were you satisfied with the pay—when you went to see Mr. Collins, that David was getting enough money for the work he was doing? [233]

The Witness: No.

Mr. Bakaly: No.

Q. (By Mr. Bakaly): You knew that David could

(Testimony of Bernard Clark.)

do better in terms of pay in Los Angeles, didn't you, on the 19th of December, 1959?

A. I didn't know there was work available.

Trial Examiner: I think we have been over that. He knew the rate up here was $3.00 an hour or more, Mr. Bakaly. He has already stated that.

Q. (By Mr. Bakaly): You knew it was $3.00 an hour or more, didn't you? A. Yes.

Q. And you say that on the 19th of December work was not available in Los Angeles, is that correct? Hadn't you been told on the 15th that a union representative could get David a job—

Mr. Mark: I am afraid that's not the testimony.

Q. (Mr. Bakaly): —if he were fired?

A. No.

Q. In any event, it was testified here that a union representative could get your son a job in Los Angeles, and you knew that on December 19th; isn't that a fact, Mr. Clark?

Mr. Mark: I think the testimony was that it would be possible to get him some work in Los Angeles. I believe the testimony of the witness prior to this was that "we could get him some [234] work in Los Angeles," and that's not a specific job.

Trial Examiner: In substance, that was the testimony and I think that was your testimony; isn't that correct, Mr. Clark?

The Witness: Yes.

Q. (By Mr. Bakaly): You knew that your son could get a couple of shifts a week as a mailer at union

(Testimony of Bernard Clark.)

scale in Los Angeles, didn't you? You knew that on December 19th, didn't you?

A. If he was discharged, yes.

Q. Your answer is that he knew it; is that correct?

Mr. Mark: I think the witness has answered your question.

Q. (By Mr. Bakaly): So it is a correct statement that you were dissatisfied with your son's job at the Daily Breeze because of the low pay and because of the hours; isn't that correct? A. Yes.

Q. And you contacted the union prior to December 15th, 1959, so as to get your son a better job at a higher rate of pay for less hours in Los Angeles; isn't that a fact? A. No, sir.

Mr. Bakaly: No further questions.

Recross-Examination

Q. (By Mr. Mark): Mr. Clark, how much was your son averaging per week, do you know, at the South Bay Daily Breeze?

Mr. Bakaly: That's been asked and answered. We have been over that several times. [235]

Trial Examiner: I think that's right, counsel.

Q. (By Mr. Mark): Just to clarify this point, at the time that you discussed with Mr. Collins the training position that was being offered to David, what figure did he mention?

Mr. Bakaly: I object—

The Witness: $55.00 a week.

Mr. Bakaly: Just a minute. I object to the question. It's been asked and answered, Mr. Examiner.

Trial Examiner: I think it has.

(Testimony of Bernard Clark.)

Mr. Mark: I think it bears on this particular issue. Counsel for respondent has been hammering away trying to show the reason this witness here had, apparently, in the back of his mind for his son's joining the union was better pay and working conditions, while at the same time it has been our position, and a statement has been made by the witness and testimony has been given, that he went over to Mr. Collins to talk to him about keeping David in his flyboy job; and as a matter of fact, on the flyboy job he was making $60.00 a week.

Trial Examiner: Mr. Mark, certainly I think we would have to conclude that this procedure of getting his son affiliated with the union was aimed at getting better pay and better working hours, if not at the Daily Breeze, then some place else. I don't see how you could have any other reasonable interpretation of what was done, and from what the record [236] shows so far this was a convenient place to work and if he could work there and get better hours and more money, why he'd like to see him work there.

Mr. Bakaly: Well, I don't think that's what his testimony has been.

Trial Examiner: What I am really doing, and incorrectly perhaps, is to make direct inferences, or arguments, with respect to the evidence—which is premature now, I know.

Mr. Bakaly: I would like to ask one question of this witness just to clear up a point that counsel here has brought out.

Further Redirect Examination

Q. (By Mr. Bakaly): So far as your conversations with Mr. Clark—with Mr. Collins, I am sorry, on the 19th of December were concerned, you stated to him that the reasons you didn't want your son to take the trainee job as a district manager was because the gas mileage would be too expensive, and the insurance would cost too much? A. Yes.

Q. And putting those two things aside, you did not object to Mr. Collins about the salary of the new trainee job, did you?

Trial Examiner: He has already stated that he didn't, Mr. Bakaly.

Mr. Bakaly: He has already testified to that, I know. [237] I just want to make it clear. Counsel is bringing up the difference between the $55.00 salary connected with the trainee's job and the amount of money that David was getting as a flyboy. The only complaint was the insurance and the gas, according to the testimony.

Trial Examiner: Now, I would like to ask Mr. Clark one question or possibly we will get into three.

Were you present on the occasion when Mr. Leathem came to your home and David was—I guess it was initiated, or made a member of the union, the Mailers Union?

The Witness: Yes.

Trial Examiner: Were you there during the whole conversation?

The Witness: Yes.

Trial Examiner: And what, if anything, was said with reference to David's obligation in connection with

(Testimony of Bernard Clark.)

doing the same kind of work as a condition of being a member of the union? Do you understand what I am asking. I am stating it generally first, and then I will see if it suggests something else more specific.

The Witness: The only condition they made was that he was not to leave the Daily Breeze. If he was to quit the Daily Breeze he would lose membership in the union. Is that your question?

Trial Examiner: Was this said before or after he was [238] sworn in by Mr. Leathem?

The Witness: That was before and after, both. He explained that to him.

Trial Examiner: That his membership was contingent on his continuing to work at the Daily Breeze?

The Witness: Yes. Mr. Leathem brought out that he could not join the union there and then go down and quit and be a member of the union with the rights and privileges.

If he was to quit his job, he would lose his membership.

Trial Examiner: Was there any statement made by Mr. Leathem as to what kind of work David would have to do at the Daily Breeze to continue his membership, or was it just in terms of general employment?

The Witness: He was to keep his present mail room job.

Trial Examiner: Anything else?

Mr. Mark: No, I have no further questions.

(Testimony of Bernard Clark.)

Further Redirect Examination (Continued)

Q. (By Mr. Bakaly): Now, you have contradicted yourself, Mr. Clark. Isn't it a fact that nothing was said about David having to keep the flyboy job? Isn't it a fact that all that was said was that David had to stay at the Daily Breeze? Isn't that really what Mr. Leathem said?

A. Yes. Yes, he did say—

Q. And that nothing was said about what job he was to keep?

A. No. We didn't know of another job being available then. [239]

Q. So nothing was said about that, was it?

A. No.

Mr. Bakaly: All right, thank you.

Mr. Mark: Well, I would like to ask a question.

Further Recross-Examination

Q. (By Mr. Mark): Did you understand that David was supposed to remain at the Breeze?

Mr. Bakaly: I object to that. It is immaterial and irrelevant.

Trial Examiner: Objection sustained. Thank you, Mr. Clark.

(Witness excused.)

Mr. Bakaly: What is your pleasure, Mr. Examiner, I have two witnesses, Mr. Clark under 43 (b), David Clark, and then Mr. Collins; and then I will conclude.

I am willing to go on. I understand from Mr. Clark that David has to leave before 2:00 o'clock.

Trial Examiner: You can call David Clark now, and then we can take our lunch break.

Mr. Bakaly: I would like to call David Clark under 43 (b).

DAVID CLARK

a witness recalled by and on behalf of Respondent, having been previously duly sworn, was examined and testified further as follows:

Direct Examination [240]

Q. (By Mr. Bakaly): I want to direct your attention to the conversation that you had with Mr. Leathem and your father on December 15th, 1959.

At that time you were asked by Mr. Leathem the number of employees in the mail room of the Daily Breeze; is that correct?

A. That is correct.

Q. Is it true that at that time you told him there were seven mailers employed in the Daily Breeze?

A. What kind of mailers?

Q. Full-time mailers. A. No.

Q. You did not? A. No.

Q. You have never told him that there were seven full-time mailers at the Daily Breeze?

A. I think I told him that there—that they had seven full-time people in circulation that helped, you know, did work in the mail room.

Q. Who were those people?

A. The seven?

Q. Yes. What were their names?

A. Well, there's Dennis Daines, Lee Angelo, John Byers, Jimmy Erickson—I don't know. He had so

(Testimony of David Clark.)

many new ones in there at the last I couldn't tell you their names. [241]

Q. Did you consider Dennis Daines a mailer?

A. Up until the last, yes.

I wouldn't consider him a mailer now.

Q. You would not consider him a mailer?

A. No.

Q. You told Mr. Leathem that there were seven full-time people that did mailers' work; is that right?

A. That did some mailers' work, yes.

Q. Well, in your opinion, being a journeyman mailer, you would say that Dennis Daines and Leo Gagnon and the district managers at the Daily Breeze, the seven of them who were working on December 21st, were mailers and are now mailers; isn't that correct?

A. No.

Q. Did you state to Mr. Leathem on the 15th that there were seven part-time employees at the Breeze?

A. No. I didn't say part-time mailers, no.

Q. Isn't it a fact that you believed on December 21st that there were seven part-time mailers employed at the Breeze? A. Not mailers, no.

Q. I'd like to show you your affidavit, General Counsel's No. 2, dated the 24th day of December, 1959; and I show you Page 6 and ask you if that is your signature on that page.

A. Yes, it is, sir.

Mr. Bakaly: I offer Page 4 of this affidavit into evidence, the paragraph starting, "The paper has * * *." [242]

Are you familiar with this?

(Testimony of David Clark.)

Mr. Mark: Yes, I am.

Mr. Bakaly: This is a strict impeachment. There is no question here of recollection.

Trial Examiner: This document is in as General Counsel's 2 for identification, but you are offering in evidence the second paragraph on Page 4; is that right?

Mr. Bakaly: That is right.

Trial Examiner: And you say that there is no question this is a strict impeachment?

Mr. Bakaly: That's right.

Trial Examiner: Any objection, Mr. Mark?

Mr. Mark: Just a moment, please.

The point of my objection does not go to the admissibility of this, but the admissibility of what is contained therein as it reflects on a conversation which occurred between Mr. Clark and Mr. Leathem.

The affidavit recites merely a statement that was made by David Clark to Abraham Siegel, a member of the Board, and in no way recounts the conversation between Mr. Leathem and Mr. Clark.

Mr. Bakaly: That has nothing to do with the conversation. I asked him a direct question as to whether there were mailers there.

Trial Examiner: There is no question that this does not [243] refer to that conversation, but it is being offered as an inconsistent statement and I think that it is admissible on that basis.

Mr. Bakaly: And it is offered for impeachment, and it is offered also as a hearsay statement to prove the truth of respondent's contention in answer to the

(Testimony of David Clark.)

charging party, that there were seven full-time mailers employed at the Daily Breeze.

It is offered for two purposes: To prove that there are seven full-time mailers, that Dennis Danes was a mailer, in the opinion of this individual; and it is offered also to impeach David Clark's present testimony that there were no mailers except himself and two kids, two children.

Mr. Mark: If he wants this whole thing in as probative evidence, I have no objection. I think that the entire document should be submitted, not merely a part of it.

Mr. Bakaly: I am not going to be bound by everything here.

Trial Examiner: I think the document should come in, but you're offering it for this second paragraph on Page 4; is that right?

Mr. Bakaly: At the present time. There may be other parts that I will offer later.

Well, I guess the best thing to do is to put the whole document in.

Trial Examiner: I think it is admissible and I will receive [244] it.

Mr. Bakaly: The whole document, then?

Trial Examiner: Yes.

Do you have the original of this so that the reporter can mark it?

Mr. Bakaly: Do you want me to offer it as my exhibit, or does it come in as General Counsel's Exhibit 2?

(Testimony of David Clark.)

Mr. Mark: It has been marked as General Counsel's Exhibit 2.

Trial Examiner: I think it better be re-marked, then, since you are offering it.

Mr. Mark: Since Mr. Bakaly is going to offer the exhibit, I will withdraw the exhibit, and withdraw the identification of General Counsel's No. 2

(Thereupon, the document above referred to as General Counsel's Exhibit 2, was withdrawn from identification.)

Trial Examiner: Naturally, all that eventuates from this is that we won't have a General Counsel's Exhibit 2, is that correct?

Mr. Mark: That is correct.

(Thereupon, the document above referred to, previously marked General Counsel's Exhibit 2 and withdrawn, was re-marked Respondent's Exhibit 5 for identification.)

Trial Examiner: And there is no objection to its being received in evidence. [245]

Mr. Mark: No objection, as long as the whole document is going in.

(Thereupon, the document heretofore marked Respondent's Exhibit No. 5 for identification, was received in evidence.)

Q. (By Mr. Bakaly): Did you tell Mr. Leathem on the 15th the functions and duties of the employees working in the mailroom?

A. Well, I told him what my job was, what my duties were; and I told him that there were these dis-

(Testimony of David Clark.)

trict supervisors doing some—you know, doing some tying of the bundles, you know, and things like that.

Q. Did you tell him that they took—that they stacked the bundles and tied them, the district managers?

A. I don't know if I—I don't know. I think I said "tied them." I don't know if I said "stacked them" or not.

Q. And that they carried them and put them out on the trucks; did you tell him that? A. No.

Q. Isn't it true, Mr. Clark, that he told you that the district managers were mailers? A. No.

Q. Where is the Pacific Press located?

A. It is located on Soto Street, Huntington Park.

Q. And Rodgers-McDonald is located where?

A. Fifth Avenue—Fifth Avenue, or something. I don't know [246] the address. I know where it is at. It is in Los Angeles, somewhere.

Q. Isn't it true that it takes you just about as long on the Freeway to go from El Camino College to the Pacific Press and Rodgers-McDonald, as it does to drive down to the Daily Breeze?

A. In terms of time? On the Freeway from my house it takes a good 40 minutes.

Q. I'm talking about from El Camino College.

A. Okay. From El Camino College, say, 35 minutes.

It's only three miles from my house to El Camino College.

Q. How long does it take you to get from El

(Testimony of David Clark.)

Camino College down to the Daily Breeze? Twenty minutes?

A. It wouldn't take any more than 15, I'm sure.

Q. You don't mind driving that extra time to Pacific Press, do you?

Mr. Mark: I object.

Trial Examiner: Sustained.

Q. (By Mr. Bakaly): Now, you were told by Mr. Leathem on the 15th that your union membership was conditioned upon your staying at the Daily Breeze; is that correct? A. That is right.

Q. You were not told that it was conditioned upon your staying in one particular job, were you?

A. Not the job, no. Not the job.

Q. Thank you. [247]

And you testified the other day that you did not talk to any union representative between December 19th and December 21st; isn't that right?

A. From when?

Q. December 19th to December 21st, over that weekend. You did not talk to any representative of the mailers' union over that weekend, did you?

A. No.

Q. Prior to the afternoon of December 21st, did you talk to any representative of the union?

A. No, I did not.

Q. So you did not ask any representative of the union, either on December 19th, December 20th or December 21st up until the time that you left your employment at the Daily Breeze, whether or not you could become an assistant or a trainee district manager?

(Testimony of David Clark.)

A. But my father did.

Q. Let me get the answer to the question.

A. Did I, personally?

Q. Yes.

A. No. I didn't have any conversation, no.

Q. You say your father talked to the union between December 19th and the 21st?

A. Yes. It was one of these days, I'm pretty sure.

Q. Your father talked to the union on the 21st after you had [248] left your employment; isn't that it?

A. Yes. He phoned them up. Well, no. Maybe I misunderstood him. He said something—I told him about what had happened, you know, and I thought he said he talked to Elmo Mathieson—maybe I misunderstood.

Trial Examiner: When did this happen?

The Witness: I thought it was Sunday, but I don't know. I could be mistaken, but I thought it was Sunday. He came down to the Breeze and said he was going to talk to the union after that, after that afternoon; because I remember distinctly that that is what he said.

Trial Examiner: This is the Sunday before your termination?

The Witness: The Sunday before the Monday, yes. It would be the 20th.

Q. (By Mr. Bakaly): Well, you made up your mind not to take the job as trainee on Saturday, the 19th, didn't you?

A. Well, I wasn't sure, no, if I could take it or not.

(Testimony of David Clark.)

That's why I wanted to talk to my dad, have my dad come down.

Q. I show you Respondent's Exhibit 5 and ask you to read the paragraph—the first two or three sentences starting on Page 4 and going on to Page 5. I ask you to read it to yourself.

A. About this here, you mean (indicating)?

Q. Does that refresh your recollection that your mind was [249] made up—

A. It doesn't say that my mind was made up.

Trial Examiner: Let him finish the question.

Mr. Bakaly: At least I am entitled to do that. May I have the start of the question, please?

(Question read by reporter.)

Q. (By Mr. Bakaly): —on Saturday the 19th not to take the job as trainee?

A. No. That doesn't say that my mind—

Q. Your answer is that it does not refresh your recollection? A. Well, yes.

Mr. Bakaly: I would like to read this sentence: "On Monday, December 21st, 1959, I came to work as usual. After about 15 or 20 minutes Collins called me up to his office. He asked me, 'Well, have you made up your mind?' I replied that I had—it was the same as it was Saturday, 'I can't take the job.' "

I have read that into the record for purposes of continuity.

Q. (By Mr. Bakaly): Now, you testified that in your conversation previously—you did have a conversation on December 18th with Mr. Collins, that would be on a Friday?

(Testimony of David Clark.)

A. That's right.

Q. And you testified that Collins asked you for your card; is that right?

A. He didn't ask me for it. He asked me if I had it.

Q. He asked you if you had the card. What did you tell him? [250]

A. I told him, "No."

Q. I believe you testified in this proceeding that you did not tell him that you had joined the union?

A. That's right.

Trial Examiner: This was on what date? That last question went to what date?

Mr. Bakaly: December 18th.

Trial Examiner: I see.

Did you understand that?

The Witness: Yes, un-huh.

Q. Did you have a conversation with Mr. Collins on Tuesday, December 22nd? A. Yes.

Q. And during that conversation did Mr. Collins ask you where you had signed up, whether it was at the union, at home, or at the plant? A. Yes.

Q. And in that conversation did you reply that you signed up at home?

A. I told him I signed up at the house, yes.

Q. And did Mr. Collins look surprised at that?

A. He sort of asked, I think, he acted a little surprised about it. Maybe one person wouldn't interpret it that way, but that's the way it seemed to me.

Q. I show you your affidavit which has been submitted in [251] evidence as Respondent's Exhibit No.

(Testimony of David Clark.)

5; you state here that "He also asked me where I had signed up in the union—whether I had signed up at the plant. I replied that I would sign up at home."

Is that correct? A. Yes, that's right.

Q. And I believe you stated that he said he was paying the men full-time union wages; is that right?

A. What he said was that he thought he was paying, you know full-time—paying the men full-time union pages.

Q. And you stated that in your affidavit, didn't you? A. Yes.

Q. Who were you referring to when you said "them"? Were you referring to the mailers?

A. Not me, no.

Q. What men was Mr. Collins referring to?

A. I imagine he referred to—oh, probably Dennis Daines.

Q. Dennis Daines? A. Yes.

Q. How about Leo Gagnon?

A. Probably.

Q. When Mr. Collins told you that he was paying the full-time men union wages, you understood him to mean mailers' union wages; isn't that correct?

A. I don't know. He didn't say what union wages. [252]

Q. I'm asking what you understood him to mean.

Mr. Mark: I object to that as calling for a conclusion on the part of the witness. It may not have been within the witness' knowledge at all.

Trial Examiner: Yes. The objection is sustained.

Mr. Bakaly: This whole document is in, isn't it?

(Testimony of David Clark.)

Trial Examiner: That is correct.

Mr. Bakaly: That's all I have.

Cross-Examination

Q. (By Mr. Mark): David, may I have Respondent's Exhibit No. 5, please?

Dave, referring to Page 4 in the paragraph which refers to the mailers, what seven full-time mailers were you referring to?

A. I don't know. I mean, there wasn't seven full-time mailers. There were seven full-time men, but not mailers. They weren't strictly mailers.

Q. What were they? What was their position?

A. Supervisors, district supervisors, I guess.

Q. And are these seven full-time men you mean by "seven full-time mailers"?

A. I shouldn't have said "mailers."

Q. These people are not really mailers, are they?

A. Oh, no. They aren't mailers, no.

Q. In regard to Saturday, December the 19th, how late did you [253] work that day?

A. That's when they had a double edition, so I went in at—I don't know, 9:00 o'clock, or 9:30; and I worked until 6:00, I think.

Q. 6:00 p.m.? A. Yes, 6:00 p.m.

Q. And it was on that particular afternoon that your father had a conversation with Collins, to your knowledge? A. That's right.

Q. And the next day was Sunday?

A. That's right.

Q. Did you go to school on Monday morning?

A. That was during the Christmas vacation.

(Testimony of David Clark.)

Q. So that on Monday, December 21st, you were out on Christmas vacation already?

A. That's right.

Q. What time did you go to work at the Daily Breeze?

A. 11:00, 11:20, something like that.

Trial Examiner: A.M.?

The Witness: A.M., yes.

Q. (By Mr. Mark): What time did you come back from the Breeze?

A. What time did I get home?

Q. Yes.

A. Somewhere around 1:00, maybe a little after.

Q. What time did you go to work at the Pacific Press? [254] A. It was 11:30 at night.

Q. Was it in between 1:00 o'clock on Monday, December 21st and 11:30 of that same date that your father called Mr. Mathieson? A. Yes, it was.

Q. And to your knowledge, were there any calls besides this? A. No.

Q. So that the call you referred to was a call made by your father to Mr. Mathieson during that period of time between the 19th and the 21st?

A. Yes.

Q. Was that call made on the 21st?

A. What do you mean? The one I was talking about before?

Q. Yes.

A. I said I don't know whether he talked to Mr. Mathieson or not. I don't know who it was.

(Testimony of David Clark.)

Q. To the best of your knowledge, did your father make any other calls? A. No.

Q. And to the best of your knowledge did this call to Mr. Mathieson take place after you had terminated?

A. Yes, it was.

Redirect Examination

Q. (By Mr. Bakaly): So that as far as you know, from the time on December 19th when you were offered the job as trainee [255] until the time that you left on December 21st, no contact was made with the union? A. By me, you mean?

Q. As far as you know.

A. Contacted by whom?

Q. You or anybody else, to your knowledge, during that period of time.

A. I thought my dad did. Like I said before, I may have misunderstood. I don't know.

Q. I thought you just finished saying that this conversation was after, sometime after 1:00 o'clock.

A. I am talking about another time.

Q. You think that there would be another conversation?

A. As far as I know. I may have been mistaken.

Q. But this is just a supposition on your part, isn't it? You don't have any recollection that another conversation took place, do you?

A. No. I'm pretty sure, though.

Q. You did not make any such calls yourself?

A. No, I did not.

(Testimony of David Clark.)

Mr. Bakaly: I guess that's all I have.

Mr. Mark: That's all.

Trial Examiner: You are excused.

(Witness excused.)

Trial Examiner: Do you want to start with Mr. Collins or [256] do you want to break now?

Mr. Mark: I would like to call Mr. Clark once more.

Trial Examiner: Mr. Clark, would you resume the stand? Let the record show that Mr. Clark, Sr. has resumed the stand.

BERNARD CLARK,

recalled by and on behalf of the General Counsel, having been previously duly sworn, was examined and testified further as follows:

Mr. Mark: Let the record also show that General Counsel is calling this witness out of order with respect to one or two items of testimony.

Mr. Bakaly: I have no objection.

Trial Examiner: All right.

Direct Examination

Q. (By Mr. Mark): Mr. Clark, after your talk with Mr. Collins, did you have any conversations over the week end with any representative of the Mailers' Union No. 9, that you recall?

A. I vaguely have a recollection of it now, yes.

Q. All right. Just for purposes of clarifying the record, you say you vaguely recall it now. How was

(Testimony of Bernard Clark.)

your memory refreshed about this particular conversation? A. I remember talking to Mr. Leathem.

Trial Examiner: Between Saturday and Monday?

The Witness: Yes, between Saturday and Monday. [257]

Trial Examiner: Between the 19th and the 21st?

The Witness: I think it was Mr. Babior that I talked to and told him about this trainee program that they had for David and—

Q. (By Mr. Mark): Do you recall whether you talked to him in person or on the phone?

A. No, it was on the phone.

Q. And when was this, as best you can recall? Was it late at night, early in the evening on Sunday or when?

A. I think it was Saturday evening.

Q. Late in the evening or early in the morning?

A. I couldn't tell you, sir.

Q. And did you talk—whom did you talk to first?

Mr. Bakaly: —if he can recall anybody.

The Witness: I really can't say, sir. I—

Q. (By Mr. Mark): And who were the parties that you talked to that night?

A. I remember talking to Mr. Leathem.

Q. And you called Mr. Leathem? A. Yes.

Q. And where was Mr. Leathem?

A. See, he was at work, I remember that. But where he was working, I don't remember.

No, I don't remember. I think it was the Examiner, but I am not sure. [258]

(Testimony of Bernard Clark.)

Q. And at that time, what did you talk about? What was your conversation?

A. I told him that the Daily Breeze had offered Dave a job as a trainee, where he would not be working in the mailroom; and if he did not accept it they were going to let him go.

Q. And what did Mr. Leathem say to that?

A. Well, he said that he didn't have to take that trainee job, that he could continue on working as a mailer.

Q. As what?

A. That he could continue on working at his mailing duties.

Q. As a mailer where?

A. At the South Bay Daily Breeze.

Q. Was that the end of your conversation, as you recall? A. Yes.

Q. Did you talk to anyone else on that evening?

A. Like I say, I seem to think that I talked to someone else. It could have been Mr. Babior, but I really can't say.

Q. Do you recall talking to Mr. Babior or don't you recall talking to Mr. Babior? A. No, I—

Q. As best you can recall.

A. I think—I'm—my memory on that is so vague that I can't recall what really happened on that.

Q. Well, perhaps—do you recall what you talked about?

A. Yes. About David taking the trainee job. [259]

Q. Do you recall whether this conversation occurred before or after David was terminated?

(Testimony of Bernard Clark.)

A. That would have to be Saturday. That would have been before he was terminated.

Q. Then you do recall talking to Mr. Babior on Saturday; is that correct? A. Yes.

Q. And what did Mr. Babior say?

A. That David didn't have to take that trainee program that he had, that he could continue on with his mailroom duties at the Daily Breeze.

Q. And what did you say to that?

A. I said that was—that it was all right. I said it was all right with me, that's what I wanted.

Q. At that time did you discuss any other position for David? A. No, no.

Q. Did you solicit a position for David in any way? A. No, no.

Q. Did you ask that a job be found for David?

A. No.

Mr. Mark: I have no further questions.

Mr. Bakaly: I have a few.

Cross-Examination

Q. (By Mr. Bakaly): In your previous testimony you testified that you did not have any conversation with the union prior [260] to sometime after 1:00 o'clock on the 19th; isn't that right?

A. That's right.

Q. Then these two conversations that you have now recalled would be after that time? A. Yes.

Q. During the short recess here you had a conversation with Mr. Leathem, didn't you? A. Yes.

Q. Isn't it true that he told you about the conversation? A. He asked me if I remembered it.

(Testimony of Bernard Clark.)

Q. And then you remembered it; is that right?

A. Yes.

Q. Your memory is still quite vague, isn't it?

A. That's true, sir.

Q. The union representatives, however, did not tell you that David would lose his membership if he took the job as a trainee, did they?

A. Did they say that David would—no, no.

Q. All they said was that he didn't have to take the job? A. Yes.

Q. And this recollection is quite vague; is that right? A. Yes, it is. I'm sorry.

Mr. Bakaly: I have no further questions.

Mr. Mark: I have no further questions.

Trial Examiner: Has this Mr. Babior been identified in the [261] record?

Mr. Bakaly: He is the man who Mr. Clark first spoke to, the vice-president of the Mailers' Union at Rodgers-McDonald.

Trial Examiner: Thank you, Mr. Clark.

We will be in recess until 1:30.

(Whereupon, a recess was taken until 1:30 p.m.)

[262]

After Recess

(Whereupon, the hearing was resumed, pursuant to the taking of the recess, at 12:40 p.m.)

Trial Examiner: On the record.

Mr. Bakaly?

Mr. Bakaly: Respondent will call Mr. Collins.

Trial Examiner: Would you come up here, please, Mr. Collins?

WALTER HOWARD COLLINS

called as a witness by and on behalf of respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Bakaly): State your full name, please?

A. Walter Howard Collins.

Q. What is your occupation? By whom are you employed?

A. I am circulation manager employed by the South Bay Daily Breeze.

Q. When were you first employed by the South Bay Daily Breeze? A. About May, 1953.

Q. What positions have you held at the dates thereof from May 1953 to date?

A. I was hired as a district manager in May of 1953, and I don't recall the dates exactly, when I became assistant circulation manager; but it was about a year to a year and a half prior to becoming circulation manager in March 1959.

Q. What are the types of papers published and distributed [263] by the Breeze, and what are your duties in connection therewith?

A. We publish a seven-day a week local daily newspaper in Redondo Beach, covering the South Bay cities.

Also, we have two throwaways—we refer to them as advertisers.

My duties consist of being in charge of the distribution, the district managers, the mailroom, everything to do with the circulation department.

Trial Examiner: Off the record a minute, please.

(Discussion off the record.)

(Testimony of Walter Howard Collins.)

Trial Examiner: On the record.

Does your circulation department also include new subscription activities?

The Witness: Yes, sir.

Trial Examiner: You're in charge of that part?

The Witness: My district managers solicit a couple of evenings a week, minimum for the business.

Trial Examiner: Do you have any form of solicitation through a separate department?

The Witness: Not if I can help it.

Trial Examiner: Is there a separate group of people?

The Witness: No, there is not a separate group.

Trial Examiner: The district managers, boys, are the only ones who solicit?

The Witness: That's right. [264]

Q. (By Mr. Bakaly): How many people do you supervise, Mr. Collins?

A. Mr. Daines, who is in the office as my assistant. He is a circulation supervisor. Mr. Gagnon, plus seven more full-time district managers—do you mean that I direct or supervise directly?

Q. Yes. Whom do you direct—or did direct on December 21, 1959—would really be a more relevant question.

A. Well, indirectly the men that distribute—we have contractors that distribute—but our throwaways, there are considerable men in that group. They actually fall under my supervision, but it's indirectly.

250 carriers fall under my responsibility, but indirectly through the district managers.

Q. What about a flyboy?

(Testimony of Walter Howard Collins.)

A. Yes. He would be under me. You could say either directly or indirectly. He's responsible to me, but I also have someone in charge of the mailroom.

Q. Do you know a David Clark and his father, Mr. Clark? A. Yes, quite well.

Q. How long have you known them?

A. Well, I've known Dave at least six years, I think, if I remember right. I think it was about this time in 1954 that I, as a district manager, hired Dave as a carrier for the Daily Breeze. [265]

At that time he was not an employee because our carriers are independent contractors, but he carried the newspapers for me for a good number of years.

I'm very friendly, have been, with his father and mother, knowing them both by Jack and Edna; on a lot of occasions, practically daily, had a meeting with his dad, when he would come down for David and have coffee with me.

Q. How would you describe the character of your relationship with Dave Clark and his father?

A. I would call it a friendship, I don't think David ever looked upon me as a big boss, by any means.

We got along real well. Dave was an outstanding paperboy. The fact is that at the time he was a newspaper boy, I nominated him and he subsequently the carrier of the year award for the Daily Breeze. I don't know what the year was, probably around '55 or so, his second year on the paper.

It's always been a friendly relationship.

Q. Would you say much more than the normal relationship of an employee and employer?

(Testimony of Walter Howard Collins.)

A. Yes, sir.

Q. Did you have any special interest in Dave Clark's development and future?

Mr. Mark: I will object to that. I think that that is irrelevant and immaterial.

Trial Examiner: Wouldn't it go to the question of whether [266] Mr. Collins might consider this change of activity an improvement? This would be a preliminary question to his inquiry about the trainee program, I assume.

Mr. Bakaly: It is certainly preliminary to that. It's also background, contrary to the contention that there was any discrimination against him, or that he had done any harm to the kid, to show that he was actually interested in his well being.

Trial Examiner: I would not necessarily agree with the latter part of that, not necessarily.

I am not saying I disagree. But I think it is relevant on the question of whether this trainee program, this projected job, was more compatible with what Mr. Collins thought was good for Dave.

Mr. Mark: The question was, "Were you interested?" And that's kind of vague and very general.

I believe we should keep this a little more specific.

Mr. Bakaly: I am trying not to lead the witness.

Mr. Mark: I thank you.

Mr. Bakaly: I think the witness understands the question.

Trial Examiner: I am going to take it. I don't think there is any harm in taking it in this form.

(Testimony of Walter Howard Collins.)

Mr. Bakaly: Do you understand the question, Mr. Collins?

Trial Examiner: Would you read it, please?

(Question read by the reporter.) [267]

The Witness: Very much so. The fact is his father on—

Trial Examiner: The answer is "Yes?"

The Witness: Yes.

Trial Examiner: All right.

Q. (By Mr. Bakaly): What interest did you have in David Clark?

A. Well, as I stated before, he was an outstanding carrier boy, he never gave me any trouble, which as a district manager is a nice type of kid to have.

Then later on, after he gave up his newspaper route, I was instrumental in getting him his job as flyboy with the Daily Breeze, and during his period of flyboy he was graduated from high school, and, as a lot of boys do that I know, I think I know boys pretty well, and they all get the idea that they kind of want to work a year or so and do something else just to relax.

On my own, as well as prompting and by request of his father, I talked to David about continuing college in September.

He didn't want to go back, so I did on several occasions—

Q. The answer, I take it, is that you were interested in seeing that Dave went to college; is that it?

A. Very much so, sir.

Trial Examiner: I think the answer is clear.

(Testimony of Walter Howard Collins.)

Q. (By Mr. Bakaly): When was Dave Clark first associated at [268] the Breeze?

A. You mean as a carrier boy?

Q. As a carrier.

A. As an employee?

Q. As a carrier.

A. That was six years ago, this month, I believe.

Q. What position has he held since then?

A. He carried papers for two and a half maybe three years—I don't recall exactly how long it was—and then there was a period of time when his younger brother, Chuck, took over the route; and I don't know whether, to my knowledge, he worked any place in the meantime, but about the summer of 1958, I believe it was in July if I am not mistaken, like I say, I was instrumental in bringing him in there to replace another flyboy that had gone to another job.

Q. Can you tell us the approximate number of hours a week and the pay per hour that Clark worked, let's say, during the period of April or June of 1959 to December 21st 1959?

A. Well, about in June the time changed drastically, because on the 31st of May we began publishing a Sunday paper. Prior to that time he had been working 30, 33, 34 hours a week.

Did you ask me the rate of pay?

Q. Yes.

A. I believe at the time, under the previous circulation manager, he was getting a dollar an hour to begin with, and [269] I think he was making $1.15 when the other circulation manager left.

(Testimony of Walter Howard Collins.)

Q. And that, you have testified, was when?

A. The other circulation manager left that March.

Q. Of 1959?

A. Of '59, yes.

Q. And what rate did he have since then?

A. I was circulation manager not too very long before I increased his pay to $1.35.

Mr. Mark: I wish that this witness would be responsive.

The question was: "What were his rates of pay."

Mr. Bakaly: Oh, well, Counsel, I think the answer is very responsive, if it is any issue here at all.

Trial Examiner: Overruled. Go ahead. You increased it to $1.35 after what period of time, Mr. Collins?

The Witness: Well, I couldn't really say exactly. It was a very short time after I took over the circulation manager job, which was in March; so perhaps it was April or May before I got him that increase to the $1.35, and shortly thereafter, a very short period after, it went to $1.50 an hour.

Q. (By Mr. Bakaly): And that's what he was earning in December of 1959?

A. Yes, sir.

Q. And in December of 1959, approximately how many hours a week was he working, if you recall? [270]

A. Due to our Sunday paper, he was working quite a few hours Sunday night.

Q. Well, that is not responsive.

How many hours per week was he working?

(Testimony of Walter Howard Collins.)

A. He was working about 40 hours, maybe a little more, a little less; sometimes it would be less.

Q. Sometimes it would be less and sometimes more?

A. Yes, sir.

Q. Do any unions represent employees at the Breeze, any of your employees?

A. Oh, yes. The entire—

Q. Which unions and which employees?

A. I don't know what unions have jurisdiction over them. Our stereotype, our composing room, press room, the entire mechanical department, is all union.

Q. You have the pressmen's union in there?

A. Yes, sir.

Q. The ITU Printers?

A. I don't know if they are under the ITU. I am not that familiar with it.

Q. The stereotypers are union?

A. They're all union, yes.

Q. Are the mechanical departments closely associated with your department as to physical location?

A. Well, very much so. They're—my connection and my work [271] as far as the distribution end of the newspaper, is probably closer to the mechanical end than what you would call the front office group.

Q. What is your relationship with these other union members?

A. I guess—we get a lot of new ones over the years that perhaps I don't know—but I would say that I know most of the men in the mechanical department. I have some very close friends among them and we are always together, and the printers, as an

(Testimony of Walter Howard Collins.)

example, they will come down and sit there in my mailroom and have their lunch or the stereotype men will have their lunch in the mailroom. There's no other place for them to have lunch except there.

Our relationship is very friendly.

Q. And when they are eating lunch, and so forth, do they freely discuss the affairs of the union in your presence?

Mr. Mark: I object to the form of the question. "Freely discuss" leads to a conclusion on the part of the witness.

Trial Examiner: Well, eliminating the word "freely," do they discuss these things?

The Witness: May I use the word "freely"?

They discuss it freely with me.

Mr. Mark: I will move to strike that answer.

Trial Examiner: I will regard the answer as being do these people discuss affairs with you or just in your presence? [272]

The Witness: They don't discuss an individual problem with me, but in our general discussions, among my friends—I have my coffee with the stereotype men and all the rest of them—why naturally, I hear and overhear union discussions entirely, all the time.

Trial Examiner: I think that is clear now.

Q. (By Mr. Bakaly): On or about December 18, 1959, did you have a conversation with a member of the stereotypers' union concerning whether or not a representative of the mailers' union had been in the plant?

A. On or about that date, one of the men in the

(Testimony of Walter Howard Collins.)

stereotype department—I don't remember exactly who it was now, I don't recall—asked me if I had been approached by a representative of the mailers' union.

I said, "No. I had not."

And he said that he understood that the men had been around the building, and—

Mr. Mark: I would like to have a foundation laid for that conversation, with whom, when it was held, and so forth.

Mr. Bakaly: Well, he has already laid the foundation. He said the date was December 18th—

Mr. Mark: No, he did not.

Q. (By Mr. Bakaly): Was anyone else present besides you and the stereotype men?

A. I don't recall who all was there, because, as I say, I have [273] coffee together with the stereotype foreman, who is a very close friend of mine.

Q. Where did this conversation take place on the 18th?

A. I believe it was morning coffee across the street. There were several printers—I don't recall exactly who it was or how many were present, but it was several.

Q. Have you told us all that was said at this conversation?

A. Someone asked me if I had been approached by the mailers' union. They were inquisitive, and, naturally, I become inquisitive and I said that I had not been approached by anyone, and I still haven't, to this date.

(Testimony of Walter Howard Collins.)

Q. On the 18th of December, did you have a conversation with David Clark?

A. Yes, I did.

Q. And at what time did that conversation take place?

A. Being a Saturday, I wouldn't know exactly what time it was.

Q. But it was on the 18th?

A. Was that a Saturday?

Q. December 18th would be on a Friday.

A. Oh, a Friday. It would be some time in the afternoon, because he just worked in the afternoon.

Q. Was anyone else present besides you and Dave?

A. No, I don't believe so, because he was in the mailroom working when I asked him.

Q. What did you say and what did David say, to the best of [274] your recollection?

A. I asked him if he had been approached by someone in the mailers' union, and I thought he had been approached in the plant, and he said, yes, that he had.

Q. What else did either you or David say at this particular conversation?

A. Like I said, I thought he had been approached in the plant. I believe I asked him at the time if he was interested in the mailers' union.

I don't remember the entire conversation.

Q. Do you recall what he stated?

A. No, I don't.

Q. Do you recall whether or not he stated that he had been contacted at home or at the plant?

(Testimony of Walter Howard Collins.)

A. No, I believe he volunteered that information the next day when we talked again.

Q. He did not say, then, on that occasion?

A. No.

Q. Now, has any request been made to you, or to your knowledge any other representative of the Daily Breeze, by any representative of the mailers' union to recognize it as the collective bargaining representative of the mailers employed by you?

A. To the best of my knowledge, no.

May I ask, for what reason? [275]

Q. Go ahead and explain your answer, if you like.

A. They would, if they were to approach us, there would only be one logical person to go to, which would be the publisher of the newspaper, because, naturally, I am not in a position to negotiate with them or enter into any type of agreement; and up to that date Mr. Curry our publisher here, has never been approached.

Q. He has never been approached and you have never been approached?

A. That's right.

Q. How do you know that no one has ever approached him?

A. I asked him and he said, "No."

Q. Directing your attention to the period of time prior to your becoming circulation manager, would you tell us the nature of the employment of the district managers at that time?

A. Prior to that time, we had, I think, aside from myself, only one other full-time man, and the rest of

(Testimony of Walter Howard Collins.)

them were at one time, the biggest share of the district managers, they were all part-time.

The biggest share of them were plant guards out at these various aircraft plants, because their hours were such, as guards, the ones on the graveyard shift, so to speak,—that was the only shift that wouldn't interfere with our hours of operation. In other words, a day shift or a swing shift would [276] interfere with our hours. We needed a man to do some work during those hours and some of these fellows needed more money, and so that's how we got to using those guards.

And then from there we went—I don't know what happened, but we suddenly got a splurge of milkmen, as the guards got changed in their shifts; and what with the changing of the shifts and the changing in the aircraft plants, we got one man that was a milkman and from there on he let it be known to us that there were others available whenever the need be.

Q. Well, was the character of the service of these part-time district managers satisfactory to the Breeze?

A. No. Not in my opinion, no, sir. Because their main job, their main interest laid elsewhere. To them, getting the papers out to the boy's house and dropping the bundle and running home as fast as they could and getting to bed seemed to be all there was to it.

Mr. Mark: I am going to ask, Mr. Trial Examiner that the witness be restrained from volunteering quite as much information as he is doing here. He's not answering the question. He could have answered that last question with a simple "yes" or "no".

(Testimony of Walter Howard Collins.)

Trial Examiner: It wasn't satisfactory. I think perhaps, Mr. Collins, that it would be helpful and a more orderly procedure if you would answer the question fully, but no more than that. [277]

Mr. Bakaly: Well, we have a dilemma here. I think I am not permitted leading questions. If counsel wants me to lead this witness so that I will get briefer replies, I can certainly lead this witness.

Trial Examiner: What he was saying was not exactly responsive to your question. He was explaining why it wasn't satisfactory.

Mr. Bakaly: That would have been my next question.

Mr. Mark: I have no objection to your asking the question. I simply feel that the witness should attempt to confine himself to answering what has been asked.

Trial Examiner: When you go to a little more explanation than was called for, Mr. Collins, it precludes counsel from possibly making an objection, and I think we can perhaps move just as fast if you would wait for the next question.

Mr. Bakaly: Very well, very well.

Q. (By Mr. Bakaly): Was the character of the employment of these part-time district managers steady or was there a constant turnover among the district managers?

A. The last two or three years, quite a turnover.

Q. Now, was there a change in the character of employment of the district managers after, say, April or May of 1959?

A. Yes, there was.

(Testimony of Walter Howard Collins.)

Q. And what was the character of employment after that day?

A. It was my desire to put on all full-time men so that they [278] could work their evenings soliciting and taking care of the districts, the way I felt they should be properly taken care of; and with Mr. Curry's approval, I hired all full-time district managers.

Q. Was one of the reasons why this was done an attempt to alleviate the necessity of having as much turnover as there was among the part-time people?

A. Yes, sir.

Mr. Mark: Objection. That's leading.

Trial Examiner: Overruled.

Mr. Bakaly: Well, I am damned and damned if I don't around here.

I thought I knew how to ask a question.

Q. (By Mr. Bakaly): Would you tell us whether or not this program, that of hiring full-time district managers, was successful in alleviating the problem of constant turnover?

Mr. Mark: I am going to object to that. Either this thing was satisfactory and it was working out or it wasn't satisfactory and it wasn't working out. But when you start using words like "successful," again, I am afraid we are getting an awful lot of personal comment in here, and I don't think it is proper.

Trial Examiner: Mr. Bakaly, it occurs to me the witness can say it reduced the turnover and then, if you want to go into the specifics, you can examine further. [279]

Well, let me ask: Did it reduce your turnover?

(Testimony of Walter Howard Collins.)

The Witness: Yes.

Trial Examiner: Was your circulation increased during this period of time?

The Witness: No, sir. Not too greatly.

Mr. Bakaly: I don't think that you quite understood the question. I will put it another way.

Q. (By Mr. Bakaly): Once you had hired these full-time district managers, was there still some turnover among them?

A. Yes, there was.

Q. Now, would you tell us in your words the problems that would arise because of this turnover?

A. You mean why we have the turnover? The problem arising from that?

Q. The problems that would arise because of the turnover.

A. Any time that you have a district open without a manager on it, it creates quite a few problems.

Number one is the prime necessity of getting the papers to the boy and getting them delivered as speedily as possible; also, the boys becoming very lax in their service and paying their bills and well—their general overall duties became very lax when there was no proper supervision out there on that particular district.

Q. How did you obtain the replacements for a district manager who quit or was sick or something? [280]

A. Well, we would—we had a lot of applicants on file that were looking forward. Once in awhile we inserted an ad in our paper. It was free, so we took advantage of it and advertised for full-time help.

(Testimony of Walter Howard Collins.)

Q. Were you able to get trained personnel as district managers, or did you have to train them?

A. No, sir. There's quite a lack of trained circulation supervisors, so we have to train them. It's quite a long process.

Q. Well, now, did you have any discussions with Dave Clark in the Fall of 1959 concerning this problem that would arise when a circulation manager would quit or be sick or something, the circulation district manager, I mean?

A. Specific talks with him would be hard to pinpoint down to the exact time or date.

Trial Examiner: First of all, did you have any?

The Witness: Yes, sir.

Q. (By Mr. Bakaly): As best you can recall, would you tell us the time and place of such conversations, if you can separate one from the other?

A. No, I can't. Because Dave and I spoke every day about many and various problems, personal things, as we did. But on occasions I talked to him about this and asked him if he'd be interested in filling at any time that I needed him, whenever an emergency would arise, which he offered to do, and did do, [281] on maybe two, three, four occasions.

Q. Was he compensated in any way for the use of his automobile on these occasions?

A. Not in the form of mileage, no.

He was told by myself that any time he put in any extra work or used his vehicle, to put it down on his timesheet. Because I wanted to see that he was compensated for it.

(Testimony of Walter Howard Collins.)

Q. How did you compensate district managers for the use of their automobiles in the fall of 1959?

A. District managers have always had car allowance.

Q. Would you tell us how the amount of this allowance is determined, and so forth?

A. Each one is actually paid a flat amount each week, but I have gone out with them, I have rode all the districts and I know approximately how many miles per day they have to travel and how to compensate for doing that.

Now, you can't always tell how many miles they are going to travel every day. It's not the same. Some junior out here is going to call up and say, "Hey, I'm one paper short," or his mother wants to talk to you about a particular problem or you get an irate customer who wants to give you a bad time; and to compensate for all that I give them far more than their actual daily mileage is, because it's too difficult to pin it down to the exact point.

Mr. Mark: I am going to object and ask that the entire [282] answer be stricken as unresponsive.

Trial Examiner: It may be stricken.

Mr. Bakaly: Could the question be read, please?

(Question read.)

Mr. Bakaly: I think, Mr. Examiner, that's responsive. He is saying that it is not a set amount, that it is a set amount per week and that the amount is determined, not exactly by the number of miles, but that they get more than the number of miles to take care

(Testimony of Walter Howard Collins.)

of a particular situation that might arise, emergency situations, which he has described for us.

Trial Examiner: Let's dispose of it up to this point first.

My trouble about the answer, Mr. Bakaly, is that if we continue to have just this type of answer, I couldn't project very much in using this type of answer as to whether, for example, it covered the people uniformly, whether they all got the same rate for insurance and that sort of thing.

Mr. Bakaly: I was going to take that up in future questions, but I don't see any need to strike this out. I will get to those additional questions as soon as I can.

Trial Examiner: Well, let me ask—I have indicated in the record that it may be stricken and I may reverse that; but I want to ask Mr. Collins a question first.

Do all of the district managers get the same amount for car allowance? [283]

The Witness: No, sir.

Trial Examiner: Does it depend in measure at least on the size of their district and your estimated mileage?

The Witness: Yes, sir.

Trial Examiner: What is the excess, as you have stated, that you allow them over what their actual mileage would require? This is the part that troubles me. I don't know what the excess is or how you arrive at the conclusion as to how much you pay them over what their mileage would indicate.

(Testimony of Walter Howard Collins.)

The Witness: Shall I answer that?

Trial Examiner: Yes.

The Witness: I try to figure a minimum of 8 cents a mile, but it is very difficult to know exactly how many miles he is going to run each day other than the stipulated run he makes each day. For instance, on his route he is hitting each one of these carriers' home in his district, and there are certain days when he might be doing a lot of extra things, because, like I said, as far as customers or carriers are concerned, there's a lot of things that can happen there; and if the kid doesn't deliver a paper route, he will have to take the paper out and throw it from his automobile himself.

Trial Examiner: Well, in the course of your work there, Mr. Collins, I assume that you have acquired some information that would indicate the mileage a district manager totals approximately or on an average, in any given district; isn't [284] that correct?

The Witness: Yes, sir.

Trial Examiner: And that's what I am trying to find out. Is it what you call an extra allowance over and above the absolutely certain driving that the man is going to do, or is it to take care of these other occasions when driving is required?

The Witness: I figure that, sir, that the man would put on approximately—through my own experience I know that he will put on as many miles a day taking care of these little contingencies as they may arise as it would to actually run the district to drop the bundles, so it's approximately double what it would be to run his district.

(Testimony of Walter Howard Collins.)

Trial Examiner: Well, doesn't the 8 cents a mile contemplate this total probable use of the car in any district to arrive at the flat figure the man is going to be given?

The Witness: Do you mean why I use the figure of 8 cents a mile? That's the figure I got when I asked the post office what they were paying, and they stated that was an accepted Government figure.

Q. (By Mr. Bakaly): Isn't it your understanding, Mr. Collins, that the 8 cents per mile is to cover not only the expense of gasoline and tires, but also to cover depreciation, insurance and other expenses arising from the use of the car in business?

Mr. Mark: He's leading the witness again. [285]

Trial Examiner: It is leading, but I think this material is not prejudicial, any leading questions on this aspect. So I would like you to answer that, Mr. Collins.

Mr. Bakaly: Do you understand the question? Would you like it read?

The Witness: Yes, I would.

(Question read.)

The Witness: That has been my impression, that it's an established fact that mileage covers more than just the gasoline consumption, yes.

Trial Examiner: You mean the figure of 8 cents covers other factors?

The Witness: Yes. I think that's fairly common in Government circles.

Mr. Bakaly: In Government circles. Are you famiiar with that, Mr. Examiner?

(Testimony of Walter Howard Collins.)

Trial Examiner: That's why I indicated to Mr. Mark that I don't see any harm in a leading question on this subject.

Q. (By Mr. Bakaly): Now, getting back to this problem that occurred whenever a district manager would quit or leave, and the difficulty in having to get somebody to take his place; did you, during the fall of 1959, have any ideas or solutions to this problem?

A. Yes, I did.

Q. All right. And what idea or solution occurred to you? [286]

A. Well, actually, it had occurred to me long before the fall of '59. I had spoken to Mr. Curry, our publisher, on various occasions about establishing a trainee program in circulation, such as we have in our editorial and advertising departments.

It's not always easy to step out and find someone experienced, and it's not easy to break in an inexperienced person. In my opinion, it takes months to do it, and we had discussed a trainee program, perhaps as far back, I'd say, as early as April.

Q. What was your idea of the function of this trainee program? What would have been the duties of this trainee, and so forth?

A. As I saw it, and would have liked to have had it work, was to have the man as an extra man. That was one of the problems that was one of the problems that I discussed with Mr. Curry, it's having to pay a man for actually being an extra man at all times; but we never knew, when someone was unable to show up, when people were sick or a man left me without any

(Testimony of Walter Howard Collins.)

notice, I wanted someone available to step right in.

The trainee would ride the district with the various district managers, become familiar with them and know the job from start to finish.

Q. Well, was it your desire to have your district managers know more than just the duties connected with their particular district? [287] A. Yes.

Q. What did you expect your district managers to know in that regard?

A. Well, to begin with I insisted that they all know the complete mail room operations, and even my job. I wanted them to know my job, and I quite frankly told them that I wouldn't hire a man to work for me that didn't want my job and didn't want to learn it and be able to take it sometime.

Q. During December of 1959, did most of the district managers know the job of flyboy and were they able to perform that function? A. Yes, sir.

Q. Did you ever discuss with Clark this idea of the trainee program prior to December of 1959?

A. Does that have to be answered yes or no?

Q. Yes. Did you have a discussion with him involving that subject? I'd like to know about that and then we can take it from there.

A. Yes, and no.

Q. Where did the conversation take place?

Mr. Mark: Just a moment. The witness has testified, "yes and no," and I'm afraid that is not clear enough.

Trial Examiner: It is certainly something that may be contrary to ordinary practice.

(Testimony of Walter Howard Collins.)

Mr. Bakaly: This is just foundation, but— [288]

Trial Examiner: I think maybe if Mr. Collins will explain first what he means by, "Yes and no," then we can proceed.

The Witness: What I meant by, "Yes and no," was that we had discussed having an extra man in there but it was never discussed with Dave as a trainee program, as in the sense of that word, actually using those words as a definite trainee program; because it wasn't approved until much later.

Q. (By Mr. Bakaly): But the idea of having an extra man who would know the district of each of the district managers so that he could step in in the event that one was sick, or quit, was discussed with Dave; is that correct?

A. Yes. I am certain of that.

Q. Well, now, did you, in December of 1959, obtain approval of this program?

Mr. Mark: I object to that as leading.

Mr. Bakaly: Oh, well, that's foundational, Counsel. You're going to have us here all next week.

Mr. Mark: It's not that. But if there is a trainee program, or if it was discussed and approved we can just as easily know when it was approved.

Mr. Bakaly: I am getting to that, but he's got to know what I am talking about.

Trial Examiner: The objection is overruled.

Mr. Bakaly: You can answer the question yes or no. Did you have occasion to see Mr. Curry concerning the approval of [289] this program?

The Witness: Yes, sir.

(Testimony of Walter Howard Collins.)

Q. (By Mr. Bakaly): What occasion, if any, caused you to attempt to secure final approval of the program in December of 1959?

A. I believe it was about the 15th of December when Mr. Curry also gave me the approval to take Mr. Daines off as a district manager and bring him inside as my assistant.

Q. What did that have to do with your asking Mr. Curry for approval of this training program?

A. It necessitated hiring another man who was inexperienced.

I expected to find an experienced man, but could not find one.

Q. You had some difficulty, I take it, in obtaining personnel to replace Mr. Daines when he became your assistant circulation manager; is that correct?

A. In finding experienced personnel, yes. [290]

Q. And this brought to a head your discussions of the last two or three months concerning the desirability of having a trainee program?

A. Yes. Because I had lost a couple of the full-time district managers, and due to their lack of interest in the work, and maybe not knowing what type of work they were getting into, whether they were going to like it or not, for various reasons they left and left me in the same position of hiring people that were unfamiliar with the work, and I didn't even know at the time of hiring whether they had the desire to learn the newspaper business or not.

Q. Did you have a discussion with Mr. Curry then

(Testimony of Walter Howard Collins.)

regarding the approval of the training program, in December of 1959? A. Yes.

Q. When did this conversation take place?

A. About the 15th of December.

Q. Where?

A. Mr. Curry's office.

Q. Who was present?

A. Mr. Curry and myself.

Q. What was said to you by Mr. Curry and what did you say to Mr. Curry, to the best of your recollection?

Mr. Mark: I'm going to object to that as hearsay.

Trial Examiner: It goes to motivation in laying off or terminating Mr. Clark. This type of evidence is admissible, [291] in my judgment, with respect to the motivation, and is being received for that purpose. Its ultimate acceptance or non-acceptance will depend on the witness here, not on what Mr. Curry said, when it's being used for explaining motivation with respect the question of district managers.

That is the reason why I am overruling your objection, Mr. Mark.

Go ahead.

Mr. Bakaly: Would you read the question again?

Trial Examiner: I believe that the question was: What was said by you and what was said by Mr. Curry—

Mr. Bakaly: —at this conversation—

Trial Examiner: —at this conversation, or discussion, regarding the approval of the training program?

(Testimony of Walter Howard Collins.)

Mr. Bakaly: That's right.

The Witness: Whenever I hire a new person I have to have his approval, and I walked in there with the notice that I always give him when I hire someone—

Trial Examiner: Excuse me. Maybe it's necessary—to understand it, if you can tell us what you said and what he said, then maybe we can—

The Witness: Well, I went in and told him I had to hire another inexperienced man.

Trial Examiner: All right. What did he say?

The Witness: And I don't recall exactly what he said [292] to that, but I went on to tell him that I felt that there was very definitely a need for this trainee program, and that I wanted to do something about it.

Trial Examiner: Was there anything else said?

Q. (By Mr. Bakaly): What did you recommend to Mr. Curry, if anything?

A. I recommended that we start the trainee program.

Q. What did you tell him with respect to the type of duties of a trainee, the rate of pay, the hours—if anything?

A. We didn't discuss the type of work at that time, because we had discussed it briefly; but he did give me his approval as to my suggestion of starting a trainee program at $55.00 a week for approximately a 33 hour week.

Trial Examiner: We will take a short recess now.

(Thereupon a short recess was taken.)

Trial Examiner : On the record.

Q. (By Mr. Bakaly): What was decided in this

(Testimony of Walter Howard Collins.)

conversation with Mr. Curry, if anything, concerning the first step in this trainee program?

A. We discussed the trainee program and it was my belief that the first step in this trainee program should be that of a fly boy.

Trial Examiner: Is that what you told Mr. Curry?

The Witness: I told Mr. Curry—I'm sorry—yes.

Q. (By Mr. Bakaly): Did Mr. Curry concur? [293]

A. He agreed with me, yes.

Q. Did you make any recommendation for a person to fill this position of trainee that Mr. Curry approved?

A. Yes, I did.

Q. And who did you recommend?

A. David Clark.

Q. Why?

A. David Clark was the only logical for the job because he had considerable experience right back dating from the newspaper boy days, and, naturally, he would understand the newspaper boys side of the thing, their problems; and he had—we'll say he had fulfilled a good share of the trainee program already as knowing the mail room procedure, and was in a position to take over as a trainee.

Q. Were there any other conversations that led you to recommend David Clark?

A. I don't know what you mean by that, I'm sorry.

Trial Examiner: Were there any other reasons why you told Mr. Curry he should be the one to be the first trainee?

(Testimony of Walter Howard Collins.)

The Witness: No other than my own personal like for the boy, and the job that he had done.

Q. (By Mr. Bakaly): What did that have to do with it? What did you think that the trainee job would do for Dave Clark, or to his future, if anything?

A. Well, as David had wanted to cut down his hours, it [294] would have given him less hours. It would have amounted to 33 hours a week, because he would have not been required to do any night soliciting as the regular district manager was required to do.

Actually, it would mean less hours than he was putting in and more pay for that number of hours.

Q. Well, did you give any consideration to the fact that he would gain some kind of experience that might be helpful to him in—

A. That entered into it, as—

Q. —later years?

A. —as far as my personal feeling for Dave, that entered into it; but I think one of the important reasons also was that he could have continued college, because it was a part-time job and a little easier on his schedule than the job he had at present.

Q. Did Mr. Curry approve the recommendation of Clark for the job?

A. Yes, he did.

Q. Did you have a conversation with Dave Clark on December 19, 1959?

A. What date was that?

Q. That would be Saturday.

A. Yes, I did.

(Testimony of Walter Howard Collins.)

Q. Where did it take place? [295]

A. I believe I invited Dave over for our usual cup of coffee across the street and explained it to him.

Trial Examiner: Excuse me, Mr. Collins. I'm going to ask you to listen to what your Counsel is asking you.

By way of illustration, all he asked you was where this conversation took place.

The Witness: Excuse me. The conversation took place in the restaurant across the street. It took place across the street at the Spanish Inn.

Q. (By Mr. Bakaly): I might ask here just parenthetically, Mr. Collins, have you had much experience in being a witness in a court proceeding?

A. No, sir.

Q. Now, who was present at this conversation?

A. David Clark and myself and Leo Gagnon.

Q. What was said by you and what was said by David Clark?

A. I told David that the job had been approved. I was happy that I was able to offer him this job, and I explained to him what the approximate hours would be.

Q. What did you say in that regard?

A. I told him the approximate hours would be 33 hours a week. I was basing that on a 12 to 5:30 day, six days a week; and I told him it would be at a salary of $55.00 a week, and he would be paid for anything over the 33 hours at the rate of what it broke down to, which I think was $1.67 or [296] $1.68 an hour.

(Testimony of Walter Howard Collins.)

Q. Now, did you tell him what the duties of this job would be?

A. Yes.

Q. What did you say in that regard?

A. That he would be an assistant to the district managers as a trainee to fill in where necessary.

Q. What did Clark say, if anything?

A. David wasn't sure that he could keep the job.

Q. What did he say in that regard?

A. Well, he said he didn't know whether he could take it or not, and I asked him why and he said that well, he just didn't know whether he would be able to take it, and that he would like to talk to his dad about it.

Q. What else, if anything, did he say?

A. I don't recall too much of the conversation, because probably a lot of it was just casual; but I urged him to call Jack—pardon me, his father, and come on down and talk to me about it and so we could find out why he couldn't take it.

Q. Did he say anything about the cost of carrying insurance as being a factor in why he couldn't take it?

A. Not at that time. I don't recall that.

Q. Did he say anything about whether or not he would be paid mileage at that time?

A. I don't recall whether he was saying—it was a foregone [297] conclusion with me that all the men—

Mr. Mark: I'm going to object to the answer and ask that the last part be stricken.

Trial Examiner: Mr. Collins, I believe your answer

(Testimony of Walter Howard Collins.)

was "I don't recall." The rest of the answer can be stricken. Just try to answer the questions.

Q. (By Mr. Bakaly): Did Clark say anything or complain about the wages of a trainee job in any way?

A. No, he didn't. No.

Q. Did you explain to him at that time that if he didn't take the trainee position you would have to hire somebody else?

A. No. I told him at that time that the trainee job required starting at the job that he presently held, and due to him already having had this previous experience he was the only logical person for the job, and I tried to convince him he should take the job.

Q. All right. Was anything else said by you or Dave at that conversation?

A. Not between Dave and myself, I don't believe.

Q. Did you have a conversation with Dave's father, Mr. Clark, on the 19th of December?

A. Yes, I did.

Q. Where did that conversation take place?

A. At the same place across the street. [298]

Q. At what time?

A. I would gather it was just before noon?

Q. Who was present?

A. Jack Clark, myself, and I believe Jim Hill joined us later. He was looking for me and joined us later, but—

Q. What was said by you and what was said by Mr. Clark?

A. I asked Mr. Clark, I explained the job to him again. I told him that I had asked Dave to have him

(Testimony of Walter Howard Collins.)

come down to talk to me. I explained the job to him, what it would pay, the approximate hours. I told him it would be eliminating the Saturday night work, and he told me also that he didn't believe Dave could take the job and said, "Gosh, I wish you had said this a couple or three days before."

Q. What else did he say?

A. I asked him why and he said, he told me that under the circumstances—he tried to explain something he referred to as "amnesty," the amnesty law, which at that time I did not understand.

He said for that reason he didn't know exactly where David stood, but he said he knew that Dave couldn't accept a new job. And I asked him several times, perhaps a half dozen times, him being a union man and myself not being one, what that amnesty law was all about; and he really couldn't explain it to me.

Trial Examiner: You didn't understand it, in any event? [299]

The Witness: I didn't understand it, no.

Q. (By Mr. Bakaly): What was said about Dave's working in Los Angeles?

Mr. Mark: I object. That's a leading question.

Mr. Bakaly: I asked him what, if anything. That's not a leading question.

Trial Examiner: I think it is leading, but we'll take it.

Q. (By Mr. Bakaly): Do you understand the question?

A. The discussion went on to the fact that Dave had been contacted to join the Mailers Union, which

(Testimony of Walter Howard Collins.)

he thought was a good deal for the kid. He said the kid got a break in being taken in under this amnesty law, which again, as I said, I did not understand; and I told him that well, I didn't know how that affected me whatsoever, how it affected my mail room operations. I told him that my main interest was this job that I had told him about, the job that I was offering Dave.

I think—I recall asking him if he could give me a very definite answer later, and it seemed to me that he said, "I will think about it over the week-end. Let's work something out."

I told him, I said, "I hope Dave decides to take the job."

I asked him if perhaps he could find out what this status was and work out something, let me know over the week-end, and we could talk about it again Monday. [300]

Q. I ask you again, Mr. Collins, what, if anything, was said about Dave's taking the job in Los Angeles? Is it your answer that nothing was said?

A. Oh, no, sir. I'm sorry.

Q. What was said about that, if anything?

A. Mr. Clark told me at that time, "Well, Howard" he says, "I think you ought to have the union in your mail room. It would make it easier." Or something to that extent; and I says, "Well, eventually, when I see the need for it, I'm certainly not anti-union. I will be broadminded and when the time comes for it, when there is an actual need for one, I will be willing to go along with it."

(Testimony of Walter Howard Collins.)

And he told me at that time approximately what the mailers made. He quoted a figure of $24.00 a day, for how many hours or how much per hour, I don't know but it was a round figure of $24.00, just a round figure of $24.00, and he said that if Dave wanted to he could work only a couple of shifts a week and make as much as he was making at the Breeze.

Trial Examiner: Did he say where he could do this work?

The Witness: He said in town—yes, sir. I'm sorry.

Q. (By Mr. Bakaly): What, if anything, did Mr. Clark say about the amount of pay on the new job, or the cost of operating Dave's car or the car insurance on the trainee job?

A. I don't recall any objection to the hours or to the [301] salary whatsoever, by Mr. Clark.

Q. Was anything said about car insurance?

A. No. I don't honestly—I don't remember it, I will put it that way. I don't remember his saying anything about it to me.

May I explain that, sir?

Q. You may explain it, yes.

A. Well, it's—to me, like I said previously, all of my men are paid mileage, every person in our entire plant, and—

Mr. Mark: I'm going to object to that. I don't think that this has anything to do with what Mr. Clark said.

Trial Examiner: You don't remember Mr. Clark saying anything about the insurance or mileage or re-

(Testimony of Walter Howard Collins.)

imbursement for the car operation being a problem; is that right?

The Witness: No, sir. I don't recall that. At the time it might have been said, but I don't recall it.

Q. (By Mr. Bakaly): Now, did you have a conversation with Dave Clark on December 21st?

A. Would that be Monday?

Q. Monday.

A. Yes.

Q. Where did it take place?

A. In my office.

Q. Who was present? [302]

A. I told Leo to watch for Dave and when he first came in have him come on up. I wanted to talk to him. I was busy back in my office.

Q. Leo was present?

A. Yes.

Q. Dave Clark was present and you were present?

A. Yes, sir.

Q. Anybody else? A. No, sir.

Q. When did the conversation take place?

A. When?

Q. Yes.

Trial Examiner: What time of day?

The Witness: About noon. Dave came in—actually, he came and left pretty much as he pleased, as long as he was there and got his work done. I don't recall the exact time that he came in.

Q. (By Mr. Bakaly): What was said by you and what was said by Dave Clark?

A. I again asked Dave if he had thought over

(Testimony of Walter Howard Collins.)

what I had said, if he had thought about the job over the week-end, whether he could take the job.

Q. What did he say?

A. He said, "No." He didn't want the job.—Rather, I'm sorry, that he couldn't take the job; and there were other [303] discussions, casual remarks that I don't remember. I do remember him asking if it would be necessary to stay and help break in a new boy.

Q. What else do you recall his saying, if anything?

A. I believe there was, again, a discussion about the possibilities of work elsewhere. Nothing—

Q. What was said in that regard?

A. Well, that the possibilities of working elsewhere for only two or three shifts a week or—and a heck of a lot more money, was involved.

Q. Dave said this; is that right?

A. Yes. Yes, sir.

Q. All right. You testified that Dave asked if you needed him to train a new man; is that right?

A. Yes.

Q. What did you reply to that?

A. I told him that no, it wasn't necessary because Leo was there. Anyone of the district managers knew his work.

Q. And what next occurred?

A. I can't presume—but I want to say it this way: I presumed he wanted to leave immediately, because he said, "Is there—"

Trial Examiner: Just what happened next?

The Witness: Well, I'm sorry. He asked me then if I needed him to break in a new boy, and I says,

(Testimony of Walter Howard Collins.)

"No, Dave. It's [304] not necessary," and he said, "Well, I'll show Leo what to do." I think he was in the middle of a mail galley or something. I really don't know what he was in the middle of, but it was something and he took Leo back down in the mail room to show him what he was on at the time, and he left apparently 25 or 30 minutes after showing Leo where he had left off in his work.

Q. (By Mr. Bakaly): Did Clark say, in this conversation with you, that he wanted to remain on as a fly boy?

A. No, sir. He never said it or even implied it.

Q. Did he complain about being offered the trainee job?

A. No, he didn't. The only thing to that effect was, "I wish I had known about it a few days earlier."

Q. All right. Now, after Clark left on the 21st, what, if anything, did you do concerning obtaining payment for him for the services he had rendered at the Breeze?

A. I made my usual note to the general office, rather, our business office, regarding him leaving us. I requested that he be paid for the whole day Monday. He hadn't worked the full day, but I requested that he be paid the full day Monday, as well as the full day Saturday he worked, plus, I believe, three more days at the new scale that had been agreed upon which I had already requested, which I had already turned into the business office for.

Q. Did you have a conversation with Clark on December 22nd? [305]

(Testimony of Walter Howard Collins.)

A. What day was that?

Q. That would be the next day, Tuesday.

A. Tuesday? Yes.

Q. Where did it take place?

A. In my office.

Q. Who was present?

A. I believe Leo and I were sitting there discussing something when Dave came in to get his paycheck.

Q. What was said by you and what was said by Dave?

A. Well, when Dave came in I gave him his regular paycheck, which was for the payroll period ending the previous Friday—the date I'm not sure exactly what that would be, the 18th I think. [306]

Trial Examiner: You gave him two checks?

The Witness: I gave him one, and then—I hadn't got to that, sir.

Trial Examiner: I assume that you gave him two checks.

The Witness: I gave him his regular check, and then I gave him his other check and again said I was very sorry to lose him, but I didn't ask him again anything about changing his mind, or anything because—

Trial Examiner: I think, Mr. Bakaly, that covers your questions.

Mr. Bakaly: I asked for the conversation. I asked what was said.

Trial Examiner: What was said by Dave, if anything?

The Witness: When I gave him his check he said,

(Testimony of Walter Howard Collins.)

"Well, golly, I didn't expect this. Thanks a lot," and he was quite happy to get the extra money.

There was other casual conversation in a friendly manner, which I won't attempt to try to swear to.

Q. (By Mr. Bakaly): But his demeanor on that occasion was friendly?

A. Very friendly.

Q. Was his demeanor on the 21st during your conversation also friendly?

A. We have never had anything but a friendly conversation.

Mr. Mark: I am going to put in an objection here. I [307] don't think that's relevant. I move to strike all the testimony with regard to the questions that were asked concerning his "demeanor."

Mr. Bakaly: Well, I'm going to object to this testimony being stricken, Mr. Trial Examiner, for certainly at the time the questions were asked, they were asked without objection.

Secondly, I believe the questions were relevant. A person who has been discharged or fired for any reason doesn't usually leave in a very friendly fashion, and this is the charge that we are attempting to meet here. The fact that his conduct was friendly certainly is consistent with our position that he was not discharged.

Trial Examiner: Well, it is consistent with the testimony of Mr. Collins that it was stated to him by Mr. Clark in one instance, I believe, and by David in another, that they wished they had known about this a few days earlier. So that the objection and motion to strike is denied.

(Testimony of Walter Howard Collins.)

Q. (By Mr. Bakaly): What, if anything, did Dave say about having worked the night before?

A. Oh, yes. He did say something about that. He said—he said he had worked—well, I believe it has been brought out since that he worked at the Pacific Press. At the time that he told me it sounded something like that to me, but I was not familiar with the place so that as far as the data [308] was concerned, I wouldn't be certain that this is what he said; but whatever the place was, he said that he had worked that night. He had gone up there the same day, and worked that night and he said, "Boy, it was sure rough."

Q. Now, since December 21st, 1959, have you placed anybody in the position or employed anybody as a trainee? A. Yes, I have.

Q. Who and under what circumstances?

A. One of the boys who had spoken to me about wanting to better himself. He was one of our senior carriers, John Rinde by name. He had one of our motor routes out in the suburban areas, and he came in and began the trainee program.

Q. And in what position did he begin?

A. As a trainee, and started at the flyboy job.

Q. At what rate of pay?

A. At 33 hours per week for $55.00 a week, and if he works, as I said, anything over 33 hours he is paid at a pro-rate of $1.67, $1.68 an hour.

Q. Now, Mr. Collins, was David Clark discharged from the South Bay Daily Breeze for the reason that he joined or assisted the Mailers Union or engaged in

(Testimony of Walter Howard Collins.)

other concerted activities for the purposes of collective bargaining or other mutual aid or protection?

A. Absolutely not.

Q. Was David Clark refused reinstatement or discriminated [309] against in any manner whatsoever for the reason he joined or assisted the Union or engaged in other concerted activities for the purposes of collective bargaining or other mutual aid or protection?

A. No, sir.

Q. Was Dave Clark offered the job of trainee for the reason that he joined or assisted the Mailers Union or engaged in other concerted activity for the purpose of collective bargaining? A. No, sir.

Q. Since December 21, 1959, has Dave Clark asked to be re-employed by the Daily Breeze as a flyboy or in a substantially equivalent position?

A. No, sir.

Q. (By Mr. Bakaly): No further questions.

Mr. Mark: Could I have a couple of minutes?

Trial Examiner: We will take a short recess.

(Short recess.)

Trial Examiner: On the record.

Cross-Examination

Q. (By Mr. Mark): Mr. Collins, you stated that your relationship with Dave was on a very friendly, personal basis; is that correct?

A. Yes, sir.

Q. Is your relationship with all your employees on the same [310] friendly, personal basis?

A. Very much so.

(Testimony of Walter Howard Collins.)

Q. In other words, this was not uncommon for you personally to be interested in the welfare of almost any of your employees? A. Yes, sir.

Q. When did you hire Leo Gagnon?

A. I believe in about May of this past year.

Q. Did Mr. Gagnon at any time work in the mail room? A. No, sir.

Q. He did not?

A. You mean as a flyboy?

Q. As a flyboy. A. No, sir.

Q. Did any of the personnel that you hired afterwards as full time district managers work in the mail room as flyboys?

A. Not as flyboys, but they had to learn the job.

Q. How many men would you say you had hired, just a rought figure, as district managers between the period of—let's say, May, 1959, and December 21, 1959?

A. That would be hard to say without actually checking the records for the dates. There was quite a turnover of full time men.

Q. Then you had this problem with district managers all that time; is that correct? [311]

A. Yes, sir.

Q. And you stated that you brought up the subject of a trainee program many months before December; is that correct? A. Yes, sir.

Q. And nothing had been done about it at the time all of this came up in December; is that correct?

A. Yes, sir.

(Testimony of Walter Howard Collins.)

Q. But you testified that on December 15th you talked to Mr. Curry about a trainee program?

A. Yes, sir.

Q. And you had recommended Dave at that time?

A. Yes, sir.

Q. Was David at work on December 15th, 1959?

A. Yes, sir.

Q. Was David at work on December 16th?

A. Yes, sir.

Q. Was he at work on the 17th?

A. Yes, sir,—if they were all week days.

Q. He was there on every week day?

A. Yes, sir.

Q. Then he was there on the 18th?

A. Yes, sir.

Q. An on the 19th, for the first time, you asked Dave about the trainee position?

A. It was the first time I offered it to him. [312]

Q. But the job had been okayed for him on the 15th? A. Yes, sir.

Q. You also stated that you had asked Mr. Curry about the Mailers Union, as to whether he had been contacted by them or not; is that right?

Mr. Bakaly: At what time?

Mr. Mark: The witness previously testified, I believe, that he asked Mr. Curry whether Mr. Curry had been contacted by the Mailers Union.

The Witness: I don't know whether I testified to that before or not, but I did ask Mr. Curry.

Q. (By Mr. Mark): You did ask Mr. Curry if he had been contacted by the Mailers Union?

A. Yes.

(Testimony of Walter Howard Collins.)

Q. Isn't it true, Mr. Collins, that for the first time you learned about the presence of the Mailers Union on December 18th, 1959?

A. The day I asked Dave about? Yes.

Q. So you had a conversation with Mr. Curry about the Mailers Union on December 18th; is that correct?

Mr. Bakaly: I object. Well, I withdraw the objection.

The Witness: I asked him, as publisher, if he had been contacted because, as I said,—

Trial Examiner: What day is this?

The Witness: That would be on the 18th. [313]

Q. (By Mr. Mark): Was this before or after your conversation with David? A. It was after.

Q. It was after your conversation with David?

A. Yes.

Q. Where was Mr. Curry at the time you had this conversation with him?

A. He was in his office.

Q. Did you go to his office for the express purpose of asking Mr. Curry this question?

A. Yes, sir. I was very curious as to whether he had been contacted by the union or not.

Q. What reply did he give you when you asked him?

A. He said, "No," that he had not.

Q. Did he ask you why you were asking him this question? A. No, he did not.

Q. Was that the end of your conversation with Mr. Curry?

A Quite possibly it was. I don't recall.

(Testimony of Walter Howard Collins.)

Q. He had no statement to make whatsoever about the Mailers Union?

A. I just merely asked him if he had been contacted at that time, or up to that time.

Q. He didn't ask you whether you had been contacted yourself? A. No.

Q. He didn't say something like, "No, why? Have you?" [314] A. No.

Q. He didn't wonder at all why you were asking him this question?

A. I wouldn't have been contacted by the Mailers Union. It would have been Mr. Curry, the publisher.

Q. And you had no further conversation with Mr. Curry about the Mailers Union at that time?

A. At that time? No, sir.

Q. Now, you said that you were on a very friendly, personal basis with Dave; is that correct?

A. Yes, sir.

Q. You are not on a very friendly, personal basis with the Mailers Union, now are you?

A. No, sir. I only know two people in that union, two men, by the name of Starbuck and Bowman; and I'm on a very friendly basis with them.

The fact is that I had lunch with them not too long ago. They invited me to have lunch with them.

Q. Do these men work at the Daily Breeze?

A. They are employed by me, yes, sir.

Q. You testified earlier that you have union men in the shop. Do they have a collective bargaining agreement covering these employees?

A. Do they?

(Testimony of Walter Howard Collins.)

Q. Does the South Bay Daily Breeze? [315]

A. Yes, sir. The mechanical department is all union.

Q. How about your printers?

A. Our printers, our composing room, stereotpye and press men, yes, they are all union.

Q. And there is a collective bargaining agreement currently in effect covering these people?

A. Apparently so. I know they are union men.

Trial Examiner: You don't know for sure?

The Witness: No. I'm not familiar with that.

Mr. Bakaly: It's out of his department.

Q. (By Mr. Mark): Do you know whether there's a collective bargaining agreement covering your mechanical employees?

Mr. Bakaly: If you know.

A. I couldn't say—I wouldn't know personally. I just assumed there was. They are union members.

Q. You know of your own knowledge that they are members of the union? A. Yes, sir.

Q. But whether they are covered by a contract in effect between the union and the South Bay Daily Breeze you do not know?

A. I would say I am quite sure they are, for this reason: I have heard them discuss—talking about a new contract with Mr. Curry.

Q. I see. Mr. Collins, are you familiar with the prevailing [316] wage rates for mailers in the Los Angeles area?

Mr. Bakaly: Now? At the present time?

Mr. Mark: Well, on December 18, 1959.

(Testimony of Walter Howard Collins.)

The Witness: At that time, no, sir.

Q. (By Mr. Mark): Were you familiar generally with what mailers were being paid with respect to union mailer rates?

A. No, sir. I wasn't. I haven't the slighest idea.

Q. Were you paying what you considered union scale in the mail room at the Daily Breeze?

A. To David?

Q. To David, yes.

A. I wouldn't know what the union scale was. I was paying what I considered a fair wage for the work that was done.

Q. You have also testified that at times David had used his truck or automobile— A. Yes.

Q. —to deliver bundles of newspapers.

This was not a frequent occurrence, was it?

A. No. Just probably on three or four occasions.

Q. And at that time the way that David was compensated for the use of his automobile or truck was not by any form of payment for mileage, but rather by adding hours to his time sheet?

A. That's right. Because he was not set up by our bookkeeping department as a person to give mileage to, and I just told [317] him to add whatever was necessary on his time sheet to make up the difference.

Q. So that David had never been compensated for mileage as such, but just compensated on a general basis by adding hours; is that correct?

A. Yes, sir.

Q. And you had never, in fact, paid David any mileage as such?

(Testimony of Walter Howard Collins.)

A. No, sir, not as such. But he did get compensation for it, though.

Q. You testified that this trainee program was put into effect to alleviate the turnover of employees existing in your department at that time.

Was it your intention that David work his way up to a district manager?

A. Yes. If he had wanted to make a career out of it, yes.

Q. But you knew that David had some time to go yet in school, didn't you? A. Yes.

Q. So that, actually, you had no real idea that Dave would become a district manager, anyway, did you?

A. He could have stayed as district manager on a part time basis for as many years as necessary, because the work was only in the afternoon. It would have fitted right in with his school. [318]

Q. But that wouldn't have alleviated the necessity that you had for a full time district manager who was a trainee, would it?

A. It would have alleviated it for the period of time up until I could have trained another one.

Q. But David would never have become, under the circumstances, a full time district manager, would he?

A. Not unless he decided to quit college and take the job.

Q. So, actually, the relationship between David's job and the job of a district manager was somewhat distant, wasn't it?

A. No, sir. I wouldn't say so. I had—may I add to that?

(Testimony of Walter Howard Collins.)

Mr. Mark: No, no. I'd rather you just answer the question.

Q. (By Mr. Mark): How long did you stay talking to Bernard Clark at the Spanish Inn on December 19th?

A. I wouldn't know. It was a common thing for us to go over there and have coffee. I wouldn't know the exact time we spent over there.

Q. But you would say that you were over there for quite a while?

A. Yes, sir. I believe so.

Q. In all this time did Mr. Clark say anything about amnesty?

A. Several times I asked him—I would say that I asked him at least a half a dozen times what it meant, and to my [319] understanding I never got a clear answer.

It might have been to Mr. Clark, but to myself.

Q. Did you, in any way, ask Mr. Clark what the union wanted? A. Pardon?

Q. What the union wanted with the South Bay Daily Breeze?

A. No. I don't believe I did.

Q. Did you ask Mr. Clark in any way whether Dave's job would be affected by his union affiliation?

A. Yes, sir I did.

Q. So that you knew David was a union member?

A. No, I didn't.

Q. You knew that he had signed up with the union?

(Testimony of Walter Howard Collins.)

A. I knew he had spoken with the union man. I didn't ask if he had joined at the time, however.

Q. Isn't it a fact, Mr. Collins, that on that day you told Mr. Clark you didn't want the union in, that you wanted control of the mail room?

A. I told him there was no need for one, and that at the time the need arose undoubtedly we would have a union in the mail room.

Q. On whose opinion were you basing the fact that there was no need?

A. On my on opinion.

Q. In other words, you were not disposed to have a union at the time? [320]

A. No, sir.

Q. Isn't it a fact, Mr. Collins, that on Tuesday, December 22nd, when David came in to pick up his check, you also told Dave that "We're not big enough to be union. Maybe some day, but not right now?"

A. That's exactly what I told him.

Q. And you told his father—

A. —the same thing, yes, sir.

Mr. Mark: I have no further questions.

Redirect Examination

Q. (By Mr. Bakaly): You have testified, on examination by Mr. Mark, that on the 15th you received approval for the job and that you didn't—it's in evidence that you didn't—contact Dave Clark about the job until Saturday, the 19th? A. Yes, sir.

Q. Would you tell the Examiner why there was a four day delay?

(Testimony of Walter Howard Collins.)

A. Well, I had asked for and received approval to pay Dave at the new scale, assuming he was going to take the job. His new scale would have began Saturday; and, such as I do with all the men—I don't even tell them about their raise until I hand them their pay checks and call them in and talk to them and congratulate them and so forth—and Saturday was the beginning of the new period, his new pay period, and he would have started in at the new rate at that time. [321]

Q. You assumed that he would take the job at the new rate, didn't you?

A. I assumed that until Monday, that he was going to take the job, yes, sir.

Q. Did you know on December 19th or December 21st whether or not the Mailers Union represented district managers who did part time mailers work?

A. No, sir.

Q. You didn't know whether they did or whether they didn't? A. No, sir.

Q. Did you know on December 19th that if Dave Clark took the job of trainee he could not be represented in collective bargaining by the Mailers Union?

A. No, sir.

Q. Did that enter into your decision to offer him the job in any way?

A. Not the least bit, no.

Q. Did your decision concerning the Mailers Union enter into the offer of the job to Clark, of the trainee job to Clark in any way?

A. I don't get that first part.

(Testimony of Walter Howard Collins.)

Q. Did you desire concerning the Mailers Union, or your statement, the statement that you made to Mr. Clark that you didn't want the Mailers Union there, or words to that effect, did this have anything to do with your offering Dave Clark [322] the job of trainee?

A. Absolutely not.

Q. You assumed, as a matter of fact, that he would take the job; isn't that true?

A. I assumed it when I first discussed it with Mr. Curry.

Mr. Bakaly: No further questions.

Recross-Examination

Q. (By Mr. Mark): You say that a delay of four days in telling Dave about the trainee position was necessitated by the fact that you wanted to set this thing up and, actually—this is my recollection of your testimony—give David a check and start him out at the new pay before telling him; is that it?

A. No, sir. Your payroll period ends every Friday, and you pay the following Tuesday at the new scale.

Q. But you wanted time to get that all set up; is that correct?

Mr. Mark: I don't have the original of this document, and I wonder if Respondent Counsel has it in his possession. This is a copy of an interoffice communication signed by "Howard", and the top line of which reads, "From H. Collins to R. L. Curry/Don Throe."

I assume that Counsel has the original.

(Testimony of Walter Howard Collins.)

Mr. Bakaly: Do you want the original or do you want a copy? [323]

Mr. Mark: We need the original and a copy.

Mr. Bakaly: I don't have a copy.

Trial Examiner: Off the record.

(Discussion off the record.)

Trial Examiner: On the record.

Mr. Mark: I will ask the reporter to mark this copy of the interoffice communication as General Counsel's Exhibit No. 4.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 4, for identification.)

Q. (By Mr. Mark): Mr. Collins, I show you this interoffice communication which has been marked for identification as General Counsel's Exhibit No. 4, dated 12-22-59 and signed by "Howard", is that your signature? A. Yes, sir.

Q. Would you kindly read aloud the second paragraph of this document?

Mr. Bakaly: Read it aloud?

Mr. Mark: Read it aloud. —for purposes of continuity. [324]

The Witness: "Under the trainee plan, he was to work approximately 33 hours weekly, at the rate of $55 per week. Breaking that down, it amounts to $1.67 per hour. As he put in eight hours Saturday, 12-19-59, and it is my desire to give him some termination pay, please give him three additional days of six hours each, or a total of 26 hours pay at the rate of $1.67 per hour, for a total termination check of $43.42."

(Testimony of Walter Howard Collins.)

And that's signed by me.

Mr. Mark: I'd like to offer this exhibit into evidence, please.

Trial Examiner: Is there any objection?

Mr. Bakaly: No objection. It's our copy.

Trial Examiner: It will be received in evidence.

(Whereupon the document referred to, General Counsel's No. 4, was received into evidence.)

Q. (By Mr. Mark): Is it not a fact, Mr. Collins, that the first direction you ever gave for the rate of pay, or the change in the rate of pay for David, was at the time you wrote this communication?

A. No, it isn't.

Q. Did you give any other such direction?

A. Yes, sir.

Q. When?

A. I don't recall the exact date. It would have been—[325] it could have been even after this, if David had stayed at the job.

Q. But it was not before this, was it?

A. I don't remember, sir. I know I put another one in.

Mr. Mark: I have no further questions.

Further Redirect Examination

Q. (By Mr. Bakaly): Didn't you testify, Mr. Collins, that the reason you didn't advise David sooner of this offer of a better job was also because it was your usual practice to inform employees of a promotion or raise at the beginning of the pay period when the raise or promotion went into effect?

(Testimony of Walter Howard Collins.)

A. Yes, sir. I have two of them now that don't know this week, and won't know it until today when we give them their checks.

Mr. Bakaly: No further questions.

Trial Examiner: Do you have any more questions, Mr. Mark?

Mr. Mark: I have no more questions.

Trial Examiner: I have a few.

Does this individual that you employed when David left, does he work inside or does he work relieving the district managers?

The Witness: He has gone out with the district managers already, and he is now starting in and learning the [326] fly boy's job.

Trial Examiner: He has taken the place of district managers on occasions when they couldn't work for some reason or another?

The Witness: There has been no occasion arise recently, but he is capable of it.

Trial Examiner: What have been his main duties and hours—or duties, first? Then I will ask you—

The Witness: Right at the first, it is learning the mailing procedure; and when he has occasion now and the need arises, he helps out as an assistant to one of the district managers.

Trial Examiner: How does he assist them? Or I will put it this way: Does he assist the district managers?

The Witness: Actually, to this present stage, all he has had to do is ride with one of the district managers to familiarize himself with the various districts.

(Testimony of Walter Howard Collins.)

Trial Examiner: And how frequently does this occur—has it occurred?

The Witness: It has occurred not too frequently. It depends on how early we get the press run off.

Trial Examiner: Well, in terms of days since December 22nd, how many times has this individual gone out, would you approximate?

The Witness: I wouldn't know, sir, because I am not [327] down in the mail room. He may have gone on several occasions. He might have gone two or three times. I don't know.

Trial Examiner: Who determines whether he goes out?

The Witness: Leo Gagnon.

Trial Examiner: Your assistant?

The Witness: Yes.

Trial Examiner: As it stands now you, in effect, still don't have a relief person for the district managers?

The Witness: No, sir. Because this boy is still a little new at this job.

That is the difficulty with starting all over again.

Trial Examiner: I use the word "relieve", but when he comes—or functions that way, then, in turn, you will have to replace him to do the work that Dave was doing, won't you?

The Witness: That's right. He is also a college student at the same college that Dave attends, and we had to work out a schedule and everything with him.

Mr. Bakaly: Speak up, Mr. Collins.

The Witness: And he had to realign his schedule

(Testimony of Walter Howard Collins.)

We worked it all out with him and he is being pretty well established now.

Trial Examiner: What hours does he work?

The Witness: I believe he gets there from school some time between 12:00 and 12:30. He's paid until 5:30, but we let him go at 3:00 o'clock if the press is finished and [328] he has his work done.

Trial Examiner: On Saturdays what are the hours that he works?

The Witness: He doesn't work Saturdays.

Trial Examiner: He works just during week days; is that correct?

The Witness: He works Sunday morning, plus the five weekday afternoons.

Mr. Bakaly: That is, at the present time?

The Witness: Yes.

Mr. Bakaly: Perhaps you should explain when you started operating a Sunday paper. There's been a change since December 21st that hasn't appeared in the record. They have now gone to a seven-day week.

The Witness: We have now picked up our Saturday paper again, which we dropped in favor of the Sunday paper when that started. That started last June 1st.

Trial Examiner: Is the Sunday work in the mail room, the work that this boy does?

The Witness: Yes.

Trial Examiner: And is that in the early hours, or what time?

The Witness: Yes, sir.

Trial Examiner: About what time?

(Testimony of Walter Howard Collins.)

The Witness: I believe he comes to work late Saturday [329] night. I'm not sure of the exact hours he comes in, but probably about 11:00 o'clock.

You see, we have also had a change in our schedule, the schedule of our shops. One of the advertisers or throwaways that we used to put out on a Saturday evening, as Dave Clark knows we used to go to press at 7:00 o'clock and now that we have a Saturday daily again, the shopper is run immediately after the daily; and so this boy doesn't come in until that has been completed.

In other words, he comes in just in time to go to work on the Sunday daily.

Trial Examiner: Maybe one general question will conclude this: Would you detail as much as you can how the work of your ex-carrier, the carrier that you now have classified as a trainee, differs from the work that David was doing when he was working there at the Daily Breeze?

The Witness: Basically, very little. Until he learns all the mail room procedure which, in my opinion, will take him about two or three months to get that down, the only thing different that he does—he comes in to the office and makes up the envelopes for the district managers the next day, and Leo Gagnon is teaching him some of that procedure for making the draw and so forth.

Trial Examiner: So that, if I understand you correctly, you don't have a trainee function in the way that you [330] contemplated David would function. You have a different type of employment.

(Testimony of Walter Howard Collins.)

The Witness: That's very true, because we didn't have anyone else experienced enough to send in to do the work. That's why it was offered to David, because he had all of that foundation behind him.

I could use one real well right now.

Trial Examiner: What happens when—and I assume that these district managers take vacations, or that one of them will get sick once in a while. What happens then?

The Witness: Lots of times it's a matter of the men doubling up. Right at the present time, I had to let one of the district managers go that had been there for nearly two years. He got things too fouled up.

There was a matter of some money not balancing, and so forth—

Trial Examiner: I'm—

The Witness: Anyhow, there is a vacancy right at the present time, and it's being covered by Dennis Daines. Dennis, being my assistant, is very well versed in all of the operations and he is right now trying to fill in wherever the need is, but that is actually over and above his work.

The need for a trainee is still there.

Trial Examiner: Would you explain why it is valuable for a district manager to know the job functions of a mailer [331] or a fly boy?

The Witness: My own words, sir?

Trial Examiner: I hope they are yours.

The Witness: When I was hired as a district manager, why, as a district manager I had quite a stickler

(Testimony of Walter Howard Collins.)

of a man as circulation manager; and he believed that a man should learn everything about circulation from a mail room right on through—

Trial Examiner: Well, is it something that goes to advertising rates?

The Witness: —A, B, C, and he insisted that I and everybody else learn the mail room, and I have always felt that it was a real good thing for a man to know.

In my previous testimony I said that I want every man to know everything there is to know about circulation in our department.

Trial Examiner: Well, specifically, and this would be putting into, in effect, the form of a negative, what would be the hindrance to a district manager's functions if he was not familiar with the job operations of a mailer or a fly boy?

The Witness: On several occasions Mr. Clark was late or had examinations at school, or was sick or something—

Trial Examiner: I mean in his functions just as a district manager. [332]

The Witness: Nothing with his functions as a district manager. There's a dividing line there between the functions of the two, but knowing it comes in real handy when the need arises.

Trial Examiner: You mean from the standpoint of interchanging personnel?

The Witness: Yes, sir.

Trial Examiner: That's all I have.

Mr. Bakaly: In the light of those questions, I have just a few others.

(Testimony of Walter Howard Collins.)

Further Redirect Examination (Continued)

Q. (By Mr. Bakaly): Isn't it true, Mr. Collins, that the district managers perform certain functions in your organization that are ordinarily performed by mailers?

A. Yes. He always said he was between fly boy and the district manager—

Q. I don't care what he said. I'm asking you another question, Mr. Collins.

Do the district managers in your organization perform certain functions that are ordinarily performed by mailers? Is that right?

A. Yes, sir. Certain of the functions—they tie their own papers, and load them, roll the mail, insert the papers when we have insert, and various things that would come up in a mail room. [333]

Q. You think it is important for all your people to know the various functions in the mail room before they go on to another job?

A. Yes, sir. I felt it was important for myself, and I want them all to be the same way.

Q. Do you contemplate in the near future employing another fly boy and moving the fellow that is presently a fly boy into the position of trainee district manager?

A. Very definitely. I have the approval for that, and when John Rinde becomes familiar enough with that position down there he will be replaced by another boy as fly boy, and he will become extra—what do you call it?—superfluous, a superfluous district manager, to fill in for vacancies, illnesses, shortages,

(Testimony of Walter Howard Collins.)

extra heavy days, late nights, any emergency or contingency that arises.

Q. And right now this is being performed by your assistant, these additional duties?

A. That's right. He shouldn't be doing the outside work. We are just waiting until this new boy has had enough experience.

Mr. Bakaly: That's all I have.

Further Recross-Examination

Q. (By Mr. Mark): You said that your district managers do the job of mailers. You are talking about the typing and bundling of the newspapers; is that correct? [334] A. Yes.

Q. But they are not performing the functions of a fly boy, are they?

A. On occasions they have.

Q. That is when the fly boy has been out?

A. That's right.

Q. But there is really no connection between the two jobs in terms of preparation, outside of your own desire that someone go through that period of training?

A. I think that makes a connection, yes.

Mr. Bakaly: I don't know if the record is sufficient on one point.

Further Redirect Examination

Q. (By Mr. Bakaly): Isn't it true that the fly boy works right in the same room with the district managers, in the same room where they are tying bundles and so forth, and that this is connected with the physical setup at the Daily Breeze, in that the press is just yards away?

(Testimony of Walter Howard Collins.)

A. Our situation is different from most newspapers, yes.

Q. And the physical setup at the Daily Breeze is such that the presses are in conjunction with the mail room, and that as the papers come off the press, the district managers will take their papers and begin tying them, and the fly boy will also be in the same vicinity?

A. Yes. I would say that we have conveyors probably 200 feet [335] away, and the newspapers travel from the folder in the press to where the fly boy picks them up and sets them on the table for the district managers to tie and load out.

Q. So that the fly boy and the district managers work right there together?

A. Oh, very definitely.

Q. If the fly boy had to leave for some reason, a district manager could relieve him; isn't that true?

A. The fly boy does leave every day, and one of the district managers relieves him.

Mr. Mark: No further questions.

Mr. Bakaly: May this witness be excused, Mr. Examiner?

Trial Examiner: Yes. You are excused, Mr. Collins.

(Witness excused.)

Mr. Bakaly: Respondent rests.

Mr. Mark: I have only one question to ask, and that is, if both the Trial Examiner and counsel for the Respondent are satisfied that we have testimony in the record that sufficiently covers under what conditions amnesty is granted.

Trial Examiner: Well, I will state my recollection. My recollection is that where an individual is considered qualified by the official in the union, he can be taken in without serving the apprenticeship, and at a discretionarily reduced initiation fee. [336]

That is what I got from the testimony. Is that what you had in mind?

Mr. Mark: No. Under that set of circumstances I will call Mr. Leathem to the stand again.

FRED MALACHY LEATHEM,

recalled by and on behalf of the General Counsel, having been previously duly sworn, was examined and testified further as follows:

Further Redirect Examination

Q. (By Mr. Mark): Under what circumstances is a person joining the Mailers' Union, Local No. 9, granted amnesty?

A. We grant amnesty for the purpose of effecting organization in non-organized mail rooms.

We grant amnesty to people who are qualified to perform certain aspects of the mailing trade at a reduced initiation fee.

Q. And that is in non-organized mail rooms?

A. In non-organized mail rooms, yes.

Q. And in locations where you have contracts covering mail room employees, are those persons who begin work in the mail room granted amnesty?

A. No.

Mr. Mark: No further questions.

(Testimony of Fred Malachy Leathem.)

Further Recross-Examination

Q. (By Mr. Bakaly): When you take somebody into the union as a journeyman, what experience do you require? [337]

A. We don't—we take a person—can I elaborate on this?

Mr. Bakaly: Go ahead.

The Witness: When we take a person in under amnesty, we do not concern ourselves with the experience and period of time. We concern ourselves with the ability to perform work which is under our jurisdiction.

Q. You could take a person in under amnesty as an apprentice, couldn't you?

A. No. Only as a journeyman.

Q. You cannot? A. No.

Q. So that you on occasion grant amnesty and take people into your union who would not ordinarily be qualified to be journeymen? A. Correct.

Q. And Dave Clark is not presently qualified to be a journeyman mailer, is he?

A. That is correct.

Q. He is not? A. He is not.

Mr. Bakaly: No further questions.

Mr. Mark: I have no further questions.

Trial Examiner: Thank you. You are excused.

Mr. Mark: Counsel for the General Counsel has no further questions. [338]

Trial Examiner: And Respondent rests?

Mr. Bakaly: Yes. Yes.

Trial Examiner: Are you going to argue?

Mr. Mark: No. I intend to file a brief.

Trial Examiner: How about you, Mr. Bakaly?

Mr. Bakaly: I intend to file a brief. I would like to request the maximum time permitted by the regulations for filing the brief. I think that is thirty-some days, isn't it?

Mr. Mark: There is just one other thing. Counsel for the General Counsel would like to make a motion to conform the pleadings to the proof.

Mr. Bakaly: Well, I object to this unless you state specifically in what regard.

Mr. Mark: Just on the technical points.

Mr. Bakaly: You have to tell me what you want to amend, and I will determine whether or not I want to consent to it. I cannot deal in a vacuum. I object to the motion to amend the pleadings unless specified in what regard.

Trial Examiner: Well, after exploring this motion it all seems to eventuate down to taking care of names and dates that are approximations, and if that is what Mr. Mark has in mind, I'm disposed to grant the motion,—if it means that.

Mr. Mark: That is exactly what it means, Mr. Trial [339] Examiner.

Trial Examiner: I am not sure there's any variance at all to begin with.

Mr. Bakaly: That's my understanding, and that's why I always object to this thing. There's no reason for a motion like that. If it's minor, it's not material.

Trial Examiner: It is probably appropriate, in such a motion, that opposing counsel be apprised of what the motion encompasses; but in the event there is some minor discrepancy in dates and names, why, I would consider that the motion has been made over Mr. Bakaly's objection. I will grant it.

Mr. Bakaly: I notice here that the rule, Mr. Examiner, is that you have the power to grant 35 days from the close of the hearing for the filing of briefs.

Trial Examiner: I was just trying to count the days here.

As I compute it, the maximum time I can give is until April the 21st for the filing of briefs, and that will be the date I give you.

You are undoubtedly familiar with the fact that any extension has to be addressed to the Assistant Chief Trial Examiner, 630 Sansome Street, Room 204, San Francisco, California.

I believe that it has to be received three days prior [340] to the expiration here set, and that notice of such request must be served on opposing counsel.

There being nothing further, the hearing will be closed.

(Whereupon, at 3:30 P.M., Tuesday, March 15, 1960, the hearing was closed.) [341]

GENERAL COUNSEL'S EXHIBIT 3

Article V

Jurisdiction

Section 1. All work pertaining to the mailing trade, such as dispatching and receiving of newspapers, newspaper supplements, magazines or periodicals, addressing of wrappers and newspapers; tagging, stamping, labeling; bundling or wrapping, including all types of single wrapping; preparing, stripping or pasting galley lists or wrappers; operating stencil and/or embossing machines, sorting and routing of wrappers, bundles or newspapers; dissecting, opening or marking wrappers; taking bundles or papers from conveyors, chutes or escalators; stacking; folding, whether by hand or machine; handling of bundles or mail sacks; distributing and counting of papers, leaving or returning; tying by hand or machine; sacking; delivering papers to mailers, carriers, agents, truckers or newsboys in the mailing room or delivery room; inserting, stuffing, dissecting, or dispatching of papers, envelopes, circulars, community newspapers, advertising newspapers, colored or any form of newspaper supplements, whether done by hand or power machine, including auxiliary machines used in preparatory work for making plates, stencils, or any device that may be used in placing names or addresses on wrappers or papers, etc., and the filing and correction of all such plates, stencils or galley lists, now in use or that in the future may be introduced; banding,

with wire or metal strips, of bundles, or of skids of bundled or stacked newspapers, newspaper supplements, magazines or periodicals; trucking, which shall include the placing of newspapers, newspaper supplements, magazines or periodicals on push trucks, skids or lift trucks; conveying of newspapers, newspaper supplements, magazines or periodicals by trucks, skids or lift trucks anywhere in the plant and on the loading platform; all work pertaining to the mailers' trade on the loading platform, including the loading or unloading to and from the tailgate of the trucks of all incoming and outgoing newspapers, newspaper supplements, magazines or periodicals; the stuffing or inserting of newspapers by hand or machine, whether performed within the plant or in any building leased, owned or operated by the employer. The operation, manning and handling of any and all machines, mechanical or otherwise, that may now or in the future be used to perform any of the above-mentioned work, is part of the mailing craft, and no person except members or apprentices of the Mailers' Union shall be allowed to perform such work.

Admitted in Evidence March 17, 1960.

GENERAL COUNSEL'S EXHIBIT 4

Inter Office Communication

Date 12-22-59

Subject Termination

From H. Collins

To R. L. Curry/Don Throe

Request you draw final check for David Clark, Circ. Dept. Mr. Clark was offered a new position under our Dist. Mgr. trainee program, but found it impossible to accept due to an opportunity to go elsewhere and do work which gave him more time for his college studies.

Under the trainee plan, he was to work approximately 33 hrs. weekly, at the rate of $55.00 per week. Breaking that down, it amounts to $1.67 per hour. As he put in 8 hrs. Sat., 12-19-59, and it is my desire to give him some termination pay, please give him 3 additional days of 6 hours each, or a total of 26 hours pay at the rate of $1.67 per hour, for a total termination check of $43.42.

Thanks,

/s/ HOWARD

Admitted in Evidence March 17, 1960.

RESPONDENT'S EXHIBIT 1

State of California, County of Los Angeles—ss.

I, David Clark, make this affidavit in addition to the one dated December 24, 1959.

During my conversation with Mr. Collins on or about December 18, 1959 I did not tell him I had joined the Union. He asked me what I thought about the Union and I said DC I thought it was a pretty good deal. He asked whether I had my card yet and I replied "No". He did not ask me whether I had joined nor did he ask to see my card.

During my conversation with Mr. Collins on Saturday, Dec. 19, 1959, after he'd offered me the trainee job, I said I DC wanted to talk to my dad but I didn't believe I could take it because of the high insurance costs on my car. Collins said he had to know that day because Mr. Curry was in the office and if I didn't take it he'd have to get rid of me & put someone else in the flyboy job & then train him later on the trainee job.

On Monday, December 21, 1959 Mr. Collins asked whether I'd made up my mind yet & I told him that I couldn't take it as I'd told him & my dad had told him on Saturday. I mentioned high insurance rates and mileage on my car. He said something about giving me something for my mileage. He asked what I was going to do & I said I probably could get a job in Los Angeles at my dad's shop.

All other statements in my affidavit of December DC 24, 1959 are true and correct.

When I was terminated by South Bay Daily Breeze, I was paid at the rate of $1.67 per hour for Saturday, December 19, 1959 and for Monday, Tuesday & Wednesday of the week beginning December 21, 1959. I had worked about 2 hours on Monday. Since my termination I've been sent out to work by the Mailers Union Local No. 9. I worked 3 shifts the week of December 21, 1959 & earned approximately $78.00. I believe I worked 2 shifts the following [DC] week & earned about $48.00. Since then I've averaged about 2 shifts a week earning about $50.00 each week.

I've read the above & swear that it is true to the best of my knowledge & belief.

/s/ DAVID CLARK

Sworn to before me this 22th day of January, 1960 at Los Angeles, California

CARL ABRAMS
Board Agent.

Admitted in Evidence March 15, 1960.

RESPONDENT'S EXHIBIT 2

On this the 11th day of February, 1960. I, David Clark, the undersigned, do further depose and say:

My purpose in joining the Mailers Union was to improve conditions at South Bay Daily Breeze. About four or five months ago, the paper started putting out a Sunday edition. At this time, I was told that I would go in at 4 p.m. on a Saturday and get off at midnight or one a.m. Actually, I worked on the average till about 6 a.m. on Sunday mornings.

I ~~was~~ [DC] frequently worked over 40 hours and only got paid for 40.

My father got in touch with the Mailers' Union representative. He came in around Monday of the week I was offered the trainee position.

I joined the union ~~the~~ [DC] for the purpose of attempting to improve the working conditions. I did not join the union for the purpose of securing or obtaining another job elsewhere. The Mailers Union representative told me that ~~at the time~~ [DC] if the Daily Breeze would let me go because I had joined the union, the union would find me a couple of shifts a week to work. There was no mention of getting any other jobs, otherwise.

On Saturday, Dec. 19, 1959, after offering me the trainee position, Collins told me that he would have to let me go if I didn't take the job. I did not say anything about getting a job anywhere else at that time. I told Collins I would have to talk it over with my father.

On Monday, Dec. 21, I went to work about 11 a.m. and saw Collins around 12 noon or a little after. I told Collins that my decision ~~mind~~ [DC] was the same as it was on Saturday. He said: "I'm sorry to hear that," ~~I'm going to have to let you go and was going to have to get rid of me~~ [DC] and was going to have to let me go. ~~I said~~ [DC] He said that he hated to see me go and asked how I was fixed for a job. I told him I thought I could get a job in L.A. I said this because of what the union representative had told me. ~~We talked a while, I can't remember about what except that it dealt with the u~~ [DC] I remember ~~saying~~ [DC] telling him earlier in the conversation about the increased cost of insurance and gas, and ~~I tol~~ [DC] he said that he might be able to get me something to cover my gas. I repeated to him that I couldn't take the job. He then talked about a couple of guys he had lined up for the job. I then asked him if he wanted me to stick around to help the new guy out and he said no. I asked him if he wanted me to stay and help with the mail galleys, and he said that I should because the way Leo Gagnor could learn how to do it.

I finished the galleys and left around 1 p.m. or a little after. I came home and told my father that I had been let go. My father called the union and was told by them that they could always get me a couple of shifts per week. I was told by my father to go to Pacific Press on Monday night.

Since my termination at the Daily Breeze, I have earned the following amounts:

Employer	Period Ending	AMT.
Hearst Publishing (L. A. Examiner)	Dec. 27, 1959	26.20
	Jan. 17, 1960	46.48
	Jan. 3, 1960	46.48
Rogers & McDonald	Jan. 2, 1960	39.37
	Jan. 16, 1960	52.74
Pacific Press, Inc.	Dec. 27, 1959	78.60
	Jan. 10, 1960	58.01
	Jan. 24, 1960	26.20
	Jan. 31, 1960	78.40

When I joined the union, I realized that after serving my apprenticeship—about three years—I would be eligible for journeyman wages. Apprentices make more per hour—although I don't know a definite scale—than I was making at The Daily Breeze.

When I joined the union, I understood that the union would attempt to contact the publisher of the Breeze, and negotiate a contract for the mail room. There were about six full time employees in the mail room. ~~I wa~~ [DC] I was a part time employee and there were about ~~six three or four~~ [DC] other part time employees. ~~All Some of~~ [DC] these guys only had nominal duties in the mail room. I was the only one whose job was completely in the mail room.

I have nothing further to add. I have read this statement of three pages and swear it is true.

/s/ DAVID CLARK

Sworn to and subscribed before me this 11th day of February, 1960.

/s/ DANIEL S. MARK
NLRB, Atty.

RESPONDENT'S EXHIBIT 3

On this the 5th of February 1960, I Earnest L. Gagnon, 3609 Newton Street, Torrance, Cal, home phone FRontier 5-3869, the undersigned do hereby depose and say:

I was present at a conversation between Howard Collins, circulation manager, and Dave Clark, on Saturday Dec. 19, 1959. Collins offered Dave a job as trainee in the circulation department. Dave said he would have to talk it over with his father. There was no mention of any union or union activity at this or any other time in conversations between Collins' and Dave and myself.

On Monday, Dec. 21, 1959, I was present at another conversation between Collins and Dave Clark. Collins again asked Dave if wanted the trainee job. He explained it and the advantages to Dave. Dave said he wasn't going to take the job and said he had something else in mind. He asked if he should stay to train the new fly boy and Collins said it wasn't necessary. Clark was at work for only a half hour and then left. He had said in this conversation that he was interested in more money and less time in view of his school work.

I never discussed any union with Dave or with Mr. Collins.

I have nothing further to add. I have read this statement of two pages and swear it is true and correct to the best of my knowledge.

/s/ ERNEST L. GAGNON

Sworn to and subscribed before me this 5th of February, 1960.

/s/ DANIEL S. MARK,
Atty. NLRB.

Admitted in Evidence March 15, 1960.

RESPONDENT'S EXHIBIT 4

Jurisdiction and Manning

"Section 17. All work pertaining to newspaper mailing, such as galley work, addressing, tagging, stamping, labeling, bundling, wrapping, (whether done by hand or machine), preparing lists or wrappers, operating stencil embossing machines, operating hand or power mailing machines, sorting, routing, dissecting or marking wrappers, conveying papers from the presses, taking papers from conveyors, tying machines, escalators, and from chutes which discharge papers within the mail room, or to the loading platform, stacking, folding, handling of bundles or mail sacks, distributing, counting of papers, leaving or returning, tying (whether by hand or machine), sacking, delivering papers in the mail room or to the loading platform (to mailers, carriers, agents, or newsboys or truckers), conveying of newspapers by trucks, skids or lift trucks anywhere in the plant and on the loading platform, including the loading or unloading to and from the tailgate of trucks of all incoming and outgoing newspapers, inserting (done by hand or machine), dispatching of papers,

envelopes or magazines by hand or machine, including auxiliary machines used in preparatory work, the operation of any device that may be used in placing names and addresses on wrappers, papers or lists, etc., to be used in newspaper mailing, and the operation of any machinery or device or the performance of any of the work mentioned herein, is a part of the mailing craft, and no person except competent journeymen and apprentices shall be allowed to perform such work. The Employer will make no other contract covering such work.

"Nothing herein contained shall be construed as changing in any manner whatsoever the presently existing loading platform jurisdiction and practices other than by mutual consent during the life of this contract.

"Except where size or condition of paper, or insert, render such minimum impracticable, the standard of competency for inserting of papers shall be based upon the following minimum per man. Provided, papers to be inserted shall be prepared and made ready for inserting.

"Single insert—1500 per hour

"Double insert—1000 per hour

"Triple insert— 700 per hour

"Men working on the escalators and men tying off said escalators by hand or machine shall be considered part of the same operation and one crew and have the privilege, when the run is over thirty-two (32) pages, straight run, or on any collect run of changing off at hourly intervals, with mailers performing other work, than outlined in this section, which they are competent

to perform. It is agreed that present practices of changing men off the escalators and men tying off said escalators by hand or machine presently conforms to the requirements of this paragraph.

"Men working on the escalator and men working on 'Jampol' units as operators and men tying off said escalator, by hand or machine, shall be considered part of the same operation and one crew and shall have the privilege of switching off each quarter hour within the crew.

"When the run is (a) 16 to 34 pages inclusive, straight run, two men shall be required on the delivery and of each escalator, provided that if the speed of the press is over 35,000 per hour three men shall be required; (b) 36 pages to 64 pages, straight run, three men shall be required on the delivery end of each escalator, provided that if the speed of the press is over 40,000 per hour four men shall be required; (c) 72 pages or over on a collect run, three men shall be required.

"If and when inserting machines, or Cutler-Hammer stackers or any similar equipment, are installed, it is agreed that negotiations to determine the manning of such machines shall begin not less than sixty (60) days prior to operation."

Admitted in Evidence March 17, 1960.

RESPONDENT'S EXHIBIT 5

State of California, County of Los Angeles—ss.

I, David Clark, being duly sworn, hereby depose and say:

I reside at 2501 Alvord Lane, Redondo Beach, California; phone—Frontier 9-2697.

I ~~am~~ [DC] was employed as a mailer at the South Bay Daily Breeze, 131 S. Pacific Ave., Redondo Beach, Calif., from July 1958 until December 21, 1959. I was hired by Jack Hansley, former Circulation Manager. About six months ago, Howard Collins became Circulation Manager. He is my boss and I consider him my direct supervisor.

So far as I know, all the production employees (pressmen, etc.) are union except the mailers.

On or about December 14, 1959, I joined the Mailers Union, No. 9, ITU. The Union representative, whose name I don't know, came to my home that day and I gave him my union fee and he gave me a receipt.

On or about December 18, 1959, Collins asked me if the Union had approached me. I replied that it had. Collins asked, "What did they ask you?" And I told him the Union man had asked what the paper's circulation was and whether the plant was Union. Collins then asked, "Well, what do you think of it?", and I replied that I had joined. Collins then asked whether I had my card, and I told him that I did not have it. This conversation took place in the mail room at about 5 PM, quitting time. No one else was present.

The next day, Saturday, December 19, 1959, I went to work as usual at about 10 A.M. Before I was able to go into the mail room, Collins came over and asked me to go to the Spanish Inn, a coffee shop across from the plant, with him. Collins, I, and a circulation employee named Leo Gagon, went to the coffee shop. At the coffee shop Collins told me: "I got an O.K. on this plan I had been working on for several months. It's a trainee program for the circulation department, and it is open to you, Dave, because you have the experience." He explained what my duties would be, and told me that the job would pay $55 a week (I was then making $60 a week), but would be less hours than my mailroom job. The duties involved the home delivery of the newspaper.

I told him that I didn't think I could accept the job because I had joined the Union, and because the high insurance rates on my car would make it unprofitable for me. I am 19 years old.

Collins then said, "I have to know today because if you don't want it I'd have to give the job to someone else and let you go." I asked why, and he explained that for a person to hold the trainee job he would have to have at least 3 months experience in the mailroom. I told Collins that I would check with my father.

The paper has seven "fulltime" mailers and seven "part-time" mailers. Although I was classified as a "part-time" mailer, I mostly worked on a "full-time" basis. I have the most seniority of anyone in the mailroom, except for Dennis Daines, assistant circulation manager.

When Collins told me about it, this was the first I had heard about a "trainee job". After speaking to Collins, I called my father, who then came down to see him. I don't know what was said, as I was working. Collins said nothing more about the matter to me that day.

On Monday, December 21, 1959, I came to work as usual. After about 15 or 20 minutes Collins called me up to his office. He asked me, "Well, have you made up your mind?" I replied that I had—it was the same as it was Saturday, "I can't take the job." He said he "was sorry to hear that", and that he was going "to have to get rid of me and hire someone else in my place. He said he had 3 or 4 other boys in mind. He said he would have one hired by the end of the day. I asked whether he wanted me to stick around and help the new boy, and he said "No". So far as I recall, he didn't mention the Union at that time. Leo Gagon was present at this time.

The next day, Tuesday, December 22, 1959, I returned to pick up my check. I saw Collins in his office. No one else was present. Collins again asked whether I wanted the trainee job, and I said, "No". He said he had a boy in mind, but he couldn't come to work until February 1960, because of school. He asked me whether I had a job in mind and I told him "Yes" (The Union has been sending me out to jobs as a fill-in employee in mail rooms).

Collins then started talking about the Union. He said that "some day" it would come in, but "right now" he didn't feel that the paper was "big enough" to be Union. He said he was paying the "full-time" men

Union wages. He also asked me where I had signed up in the Union—whether I had signed up at the plant. I replied that I was signed-up at home. Collins looked surprised at this.

The only one I told I had joined the Union was Collins, and, of course, he Leo Gagon. Collins told my father that someone had told him that I had joined the Union.

I have read the above statement of six (6) pages and I swear that it is true to the best of my knowledge and belief.

/s/ DAVID CLARK

Sworn to and subscribed before me this 24th day of Dec. 1959, at Los Angeles, Calif.

/s/ ABRAHAM SIEGEL,
Atty, NLRB.

Admitted in Evidence March 17, 1960.

[Endorsed]: No. 17310. United States Court of Appeals for the Ninth Circuit. National Labor Relations Board, Petitioner, vs. Southern California Associated Newspapers, d/b/a South Bay Daily Breeze, Respondent. Transcript of Record. Petition to Enforce an Order of the National Labor Relations Board.

Filed: April 26, 1961.

/s/ FRANK H. SCHMID,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

SOUTHERN CALIFORNIA ASSOCIATED NEWSPAPERS, d/b/a SOUTH BAY DAILY BREEZE,
Respondent.

PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151 et seq., as amended by 73 Stat. 519), hereinafter called the Act, respectfully petitions this Court for the enforcement of its Order against Respondent, Southern California Associated Newspapers, d/b/a South Bay Daily Breeze, its officers, agents, successors, and assigns, Case No. 21-CA-3850.

In support of this petition the Board respectfully shows:

(1) Respondent is engaged in business in the State of California, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10(e) of the National Labor Relations Act, as amended.

(2) Upon due proceedings had before the Board in said matter, the Board on February 9, 1961, duly stated its findings of fact and conclusions of law and issued an Order directed to the Respondent, its officers, agents, successors, and assigns. On the same date, the Board's Decision and Order was served upon Respondent by sending a copy thereof postpaid, bearing Government frank, by registered mail, to Respondent's counsel.

(3) Pursuant to Section 10(e) of the National Labor Relations Act, as amended, the Board is certifying and filing with this Court a transcript of the entire record of the proceeding before the Board upon which the said Order was entered, which transcript includes the pleadings, testimony and evidence, findings of fact, conclusions of law, and the order of the Board sought to be enforced.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondent and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceeding set forth in the transcript and upon the Order made thereupon a decree enforcing in whole said Order of the Board, and requiring Respondent, its officers, agents, successors, and assigns, to comply therewith.

/s/ MARCEL MALLET-PREVOST
Assistant General Counsel,
National Labor Relations Board.

Dated at Washington, D. C. this 17th day of March, 1961.

[Endorsed]: Filed March 20, 1960. Frank H. Schmid, Clerk.

[Title of Court of Appeals and Cause.]

ANSWER TO PETITION FOR ENFORCEMENT

Respondent, Southern California Associated Newspapers, d/b/a South Bay Daily Breeze, for answer to the Petition for Enforcement of an Order of the National Labor Relations Board admits, denies and alleges as follows:

I

Admits that Respondent is engaged in business in the State of California and that this Court has jurisdiction.

II

Denies each and every allegation of Paragraph (2), except admits and alleges as follows: On or about February 9, 1961 Petitioner issued its Decision and Order directed to the Respondent, its officers, agents, successors and assigns, in which said Decision and Order the Board adopted the evidentiary findings of the Trial Examiner and stated certain conclusions of law inconsistent with the conclusions of the Trial Examiner. On or about February 9, 1961 said Decision and Order was served upon Respondent by sending a copy thereof postpaid bearing government frank by registered mail to Respondent's counsel.

III

Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph (3).

IV

Opposes the granting by this Court of any of the relief sought by Petitioner in its petition herein for the following reasons:

1. Said Decision and Order of the Board is void in that it is not based upon the findings of fact found by the Trial Examiner and adopted by the Board.

2. Said Decision and Order of the Board is void in that even if it is based upon findings of fact of the Trial Examiner and adopted by the Board, said findings of fact are not supported by substantial evidence on the record considered as a whole.

3. Said Decision and Order of the Board is void in that it is based on erroneous conclusions of law.

4. Said Decision and Order of the Board deprives Respondent of its liberty and property without due process of law in contravention of the Fifth Amendment to the Constitution of the United States.

Wherefore, Respondent prays that the petition be dismissed.

O'MELVENY & MYERS
/s/ By CHARLES G. BAKALY, Jr.
Attorneys for Respondent.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 5, 1961. Frank H. Schmid, Clerk.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS

1. The Board properly found that respondent, in violation of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Sec. 151 *et seq.*), discriminated against its employee, David Clark, in order to impede unionization, and thereby interfered with, restrained and coerced its employees in the exercise of their rights under Section 7 of the Act.

2. Substantial evidence on the record as a whole supports the Board's finding that respondent interrogated David Clark about his union membership in violation of Section 8(a)(1) of the Act.

/s/ MARCEL MALLET-PREVOST,
Assistant General Counsel
National Labor Relations Board

Dated at Washington, D. C., this 24th day of April, 1961.

[Endorsed]: Filed April 25, 1961. Frank H. Schmid, Clerk.